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Supreme Court of the United States

OCTOBER TERM, 1963

No. 264

JAMES P. DONOVAN, ET AL., PETITIONERS,

vs.

CITY OF DALLAS, ET AL.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF
TEXAS AND THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS,
FIFTH SUPREME JUDICIAL DISTRICT.

PETITION FOR CERTIORARI FILED JULY 9, 1963

CERTIORARI GRANTED OCTOBER 21, 1963

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

1

IN THE SUPREME COURT OF TEXAS

No. A-9340

CITY OF DALLAS, ET AL., Relators,

vs.

**HONORABLE DICK DIXON, Chief Justice, et al.,
Respondents.**

PETITION FOR WRIT OF MANDAMUS—

Filed December 6, 1962

To the Honorable Supreme Court of Texas:

Come Now the City of Dallas, a municipal corporation, and the officials of the City of Dallas, Earle Cabell as Mayor, Elgin B. Robertson, Charles S. Sharp, Carie E. Welch, Dr. R. A. Self, Joe G. Moody, Mrs. Elizabeth Blessing, Walter H. Cousins, Jr. and George M. Underwood, Jr., as Commissioners; Elgin E. Crull, City Manager; Harold G. Shank, City Secretary; E. Lynn Crossley, City Auditor; Henry P. Kucera, City Attorney; George P. Coker, Jr., Director of Aviation; Will Wilson, Attorney General of the State of Texas; Rauscher, Pierce & Company, Inc., Almon & McKinney, Inc., McCall, Parkhurst, Crowe, McCall & Horton, Avery Mays, W. C. (Dub) Miller, Dallas Gordon Rupe, Herbert L. Nichols, and Troy C. Bateson, complaining of Respondents, the Honorable Dick Dixon, Chief Justice, the Honorable Associate Justices, Towne Young and Claude [fol. 2] Williams, of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, Texas, and James P. Donovan, Individually and as Attorney for all of the Respondents in the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas in Cause No. 16193, being an Application for Writ of Prohibition, and as Attorney for all of the Plaintiffs in Civil Action No. 9276 in the United States District Court for the Northern Dis-

trict of Texas, and would respectfully show the Court as follows:

I.

Relator, City of Dallas, is a municipal corporation incorporated under and by virtue of a Special Act of the Legislature of the State of Texas, approved April 13, 1907, which Act and its Amendments, pursuant to Title XXVIII, Chapter 13 (Home Rule Cities), Revised Civil Statutes of Texas, constitute the Charter of the City of Dallas; Relator Will Wilson is Attorney General of the State of Texas, thereto duly elected; Relators Earle Cabell, et al., are the duly elected City Councilmen of the City of Dallas, Texas; Elgin E. Crull is the City Manager of Dallas, Texas; Harold G. Shank is City Secretary of Dallas, Texas; E. Lynn Crossley is the City Auditor of Dallas, Texas; Henry P. Kucera is the City Attorney of Dallas, Texas; George P. Coker, Jr. is the Director of Aviation of Dallas, Texas; Rauscher, Pierce & Company, Inc. and Almon & McKinney, Inc. are brokers dealing in bonds of municipal corporations, both located in Dallas, Texas; McCall, Parkhurst, Crowe, McCall & Horton is a firm of attorneys situated and doing business in Dallas, Texas; Avery Mays, W. C. (Dub) Miller, Dallas Gordon Rupe, Herbert L. Nichols and Troy C. Bateson are all citizens of the State of Texas, living in Dallas, Dallas County, Texas. The Respondents, Honorable Dick Dixon is [fol. 3] Chief Justice and the Honorable Towne Young and the Honorable Claude Williams are the Associate Justices of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas; the Respondent James P. Donovan is a citizen of the State of Texas, living and residing in Dallas, Dallas County, Texas, and is attorney for all of the Respondents and Plaintiffs in the prior litigation hereto, who as a class are taxpayers of the City of Dallas and landowners in, around, and near the Love Field Airport situated in Dallas, Dallas County, Texas.

II.

The events leading up to or connected with this Application for Writ of Mandamus are as follows:

1. On April 3, 1961, George S. Atkinson, et al., owners of property near Love Field, a municipal airport, located in the City of Dallas, filed a class suit in the District Court of the State of Texas to restrain the City of Dallas from construction of a parallel runway at the airport. The suit also attacked the validity of certain revenue bonds sought to be issued under Article 1269j, R. C. S. to finance construction of the runway, and referred to as the Love Field Revenue Bonds, Series No. 395. The series designation has no significance but merely indicates the numerical sequence of the various bond issues of the City.

2. On April 7, 1961, the Hearing on Temporary Injunction was held before the 160th District Court in Dallas County, Texas, on Sworn Bill and Answer, and with three days of oral evidence having been presented to the Court. During the course of this hearing the Plaintiffs filed a Trial Amendment in which they set up "that the action of the Defendant City in creating a municipal debt by letting a contract for construction of said runway to be financed by revenue bonds, not approved at a bond election, is in [fol. 4] violation of the provisions of the Constitution of the State of Texas, and an ultra vires action on the part of said Defendant." The Plaintiffs, after judgment denying the Temporary Injunction was entered, gave notice of appeal but never perfected this appeal.

3. The Plaintiffs instead of perfecting their appeal amended their application, included more parties, and asked for a permanent injunction. The City of Dallas answered fully to the merits and filed a Motion for Summary Judgment, to which motion was attached all of the testimony that had been heard by the 160th District Court, which was duly transcribed and verified and approved by the trial court. On July 17, 1961, a Summary Judgment was rendered in favor of the City denying the permanent injunction. An appeal was taken; however, Appellants' bond on this appeal was filed on August 16, 1961, the very last day for filing under the law. The Statement of Facts and Transcript were filed on September 14, the 58th day after the rendition of judgment. On September 15 the City of Dallas made a Motion in the Court of Civil Appeals to Advance the Submission of the Cause, and this motion was granted on

September 21, 1961. The hearing was set for November 17, 1961; however, the appellants did not file their Brief until October 16, which was 32 days after the filing of the Statement of Facts and Transcript, taking advantage of a holiday time.

4. On December 15, 1961, the Court of Civil Appeals for the Fifth Judicial District at Dallas, Texas, affirmed the above Summary Judgment. Appellants filed a Motion for Rehearing on the 17th day, taking advantage of a two-day holiday. This Motion for Rehearing was overruled on January 19, 1962, and a detailed statement of the points urged on the appeal is found in the opinion of the Court, [fol. 5] styled *Atkinson vs. City of Dallas* in 353 S.W. 2d 275.

5. The Application for Writ of Error was filed by the Appellants on February 23, 1962, the last day for filing under the law. City of Dallas made a Motion to Advance for early consideration, which was granted by the Court, and on March 14, 1962, the Application for Writ of Error was denied with the notation "No Reversible Error" and that a Motion for Rehearing would not be entertained.

6. On June 11, 1962 (the last day for filing), the Petitioners filed a Petition for Writ of Certiorari to the Supreme Court of the United States. On June 25, 1962, the Supreme Court of the United States denied the Writ of Certiorari, and on October 8, 1962, overruled the Motion for Rehearing. Thus the judgment of the Court of Civil Appeals on December 15, 1961, affirming the summary judgment of the trial court became final for all purposes, and the issues decided in the Judgment of Affirmance thereby became res judicata.

7. After the refusal of the Petition for Writ of Certiorari by the United States Supreme Court in June of 1962, the City of Dallas did in the early part of September, 1962, advertise for sale Five Million Dollars (\$5,000,000.00) of Airport Revenue Bonds under Article 1269j-5. These new bonds were designated Series 401, the former Series No. 395 were cancelled when they were not sold because of the *Atkinson vs. City of Dallas* case, which kept them in the courts for more than a year and a half. However,

these are the same bonds with the exception that they are given a new designation of Series 401 instead of Series No. 395, and are in the amount of Five Million Dollars (\$5,000,000.00) instead of the original anticipated Eight Million Dollars. The bids were to be received on these [fol. 6] bonds on September 24, 1962, at 1:45 p.m.; however, on the morning of September 24, 1962, thirty-five of the Plaintiffs in the Atkinson suit, together with some of their wives and others who again allege themselves to be taxpayers and landowners in the City of Dallas, as Plaintiffs filed Civil Action No. 9276, styled *Brown, et al. vs. City of Dallas, et al.*, in the United States District Court. In this suit they seek a permanent injunction against the City to permanently enjoin the City from building the runway at Love Field, and from issuing revenue bonds to pay for the building of the same. These bonds attacked are the Love Field Revenue Bonds, Series 401, sought to be sold on September 24, 1962. In this lawsuit they again attack the right of the City to build the runway and the validity of the Love Field Revenue Bonds proposed to be issued. They also attack the Airport Revenue Bonds that had been previously issued and sold, alleging that they had been denied the right of franchise to vote on the bonds, and that the same were unconstitutional and invalid. These are the same issues that were previously raised and litigated in the *Atkinson* case. A copy of the Petition in the United States District Court suit is attached hereto and marked Exhibit "F".

8. On October 2, 1962, the City of Dallas and the other Relators herein filed an Application for Writ of Prohibition and Other Ancillary Mandatory Orders in the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas. They asked that the Court enforce its judgment in *Atkinson vs. City of Dallas* by prohibiting the Plaintiffs in the case of *Brown, et al. vs. City of Dallas, et al.*, in the United States District Court from attempting to relitigate the same issues and from interfering with the issuance and sale of the Love Field Revenue Bonds [fol. 7] which had been previously declared valid; and, furthermore, that the Plaintiffs in the *Brown* suit be required to dismiss said cause and refrain from filing any

other litigation in reference to said runway and Love Field Revenue Bonds.

9. On October 6, 1962, the Plaintiffs in the Brown suit filed an Application in the United States District Court seeking to enjoin the Court of Civil Appeals for the Fifth Supreme Judicial District from considering or acting on the Relators' Application for a Writ of Prohibition and other Ancillary Mandatory Orders.

10. On October 10, 1962, after a Hearing on Bill and Answer and documentary evidence, the United States District Court dismissed the Plaintiffs' Application for Injunction to restrain the Court of Civil Appeals from further considering City's Application for Writ of Prohibition.

11. On October 24, 1962, the Court of Civil Appeals by a divided Court with Chief Justice Dixon and Associate Justice Williams filing a Majority Opinion, denied to these Relators the relief sought. Associate Justice Young filed a written Dissenting Opinion. The Motion for Rehearing filed by these Relators was overruled on November 23, 1962. The Opinions of the Court and the Order overruling the Motion are attached hereto as Exhibits "A", "B" and "C" and referred hereto for all purposes. The Majority Opinion is based on what we consider to be a misinterpretation of the law and facts in the Supreme Court case of *Milam County Oil Mill Company vs. Bass*, 163 S.W. 577. The law and the facts in that case do not support the conclusion of the Court of Civil Appeals under the facts of this case.

It is the position of the Relators herein that the judgment in *Atkinson vs. City of Dallas* once and for all settled [fol. 8] the question as to the validity of the issuance of revenue bonds by the City of Dallas under Article 1269j-5 and the right of the City to build a parallel runway on its own land at Love Field. We further contend that the case filed by the Plaintiffs in the United States District Court as *Brown, et al. vs. City of Dallas, et al.*, is a class suit by the same class of Plaintiffs and seeks to relitigate the same issues as to the right of the City of Dallas to build the runway and to issue and sell the revenue bonds, and as such it is a direct interference with the enforcement

of the judgment in the *Atkinson* case and effectively prevents the City of Dallas from reaping the fruits of the judgment obtained. It is based upon the same issues that *had been, could have been, and should have been* litigated in the *Atkinson* case. The mere filing of the suit amounts to a cloud and a slander on the title of the bonds sought to be sold by the City of Dallas. The bonds cannot be delivered with an unqualified opinion that "there is no litigation pending" so long as that litigation exists questioning the validity of the bonds, regardless of its merits.

For comparative purposes and to substantiate the statement made by the Relators herein, we attach hereto a copy of the First Amended Original Petition of the Plaintiffs in the *Atkinson* suit, being the Petition upon which they went to trial, which is marked Exhibit "D", and the Answer of Defendant City of Dallas, which is attached hereto and marked Exhibit "E". The Plaintiffs' Petition in the United States District Court in the *Brown* case is attached hereto and marked Exhibit "F". Said exhibits are hereby referred to and made a part hereof for all purposes, the same as though fully copied herein.

Wherefore, Premises Considered, Relators pray that [fol. 9] upon notice to Respondents a Writ of Mandamus be issued directing the Court of Civil Appeals to grant the Writ of Prohibition against the Plaintiffs in the case of *Brown et al. vs. City of Dallas*, Civil Action No. 9276, now pending in the United States District Court for the Northern District of Texas at Dallas, and those similarly situated as Plaintiffs, together with such Ancillary Mandatory Orders as may be necessary to give full force and effect to the judgment rendered by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas in the case of *Atkinson vs. City of Dallas*, 253 S.W. 2d 275, and to further refrain from further litigating the matter in any Court, and will forever pray.

Respectfully submitted,

H. P. Kucera, N. Alex Bickley, Attorneys for City of Dallas, et al., 501 City Hall, Dallas, Texas.

Duly sworn to by H. P. Kucera, jurat omitted in printing.

[fol. 10]

RELATORS' BRIEF IN SUPPORT OF THEIR
PETITION FOR WRIT OF MANDAMUS

[fol. 16] In addition to the issues that are above set out, the Plaintiffs in the *Brown* case have further alleged that the Defendants are attempting to commit a fraud on the public by misrepresenting to the public the ability of the City of Dallas to retire the bonds as they mature out of the revenues from Love Field. They further allege that fraud is being committed through the use of the mails to [fol. 17] disseminate the information. This is not a new issue, but it was raised in Paragraph 9 of the Plaintiffs' First Amended Original Petition in the *Atkinson* case (see Exhibit "D"), this being the Petition upon which the case was tried. It reads as follows:

"9. That the revenues of Love Field, both present and future, are inadequate to defray current expenses and amortize the indebtedness of the City resulting from the purchase and development of said Field."

The Plaintiffs in the *Brown* case cannot now be heard to complain that they did not know, or could not have known, of the representation prior to the filing of the suit in the *Atkinson* case, because the letter of their attorney, James P. Donovan, to the Mayor and members of the City Council of the City of Dallas, dated July 21, 1962, stated:

"Before authorizing the execution of the construction contract and the issuance of Revenue Bonds to finance it, your attention is directed to the Schedule entitled 'Dallas Love Field Historic and Forecasted Revenues and Operation and Maintenance Expenses as Prepared by Geo. P. Coker, Jr., Director of Aviation for the City,' published at Page 10 of the 'Official Notice of Sale of \$8,000,000 Airport Revenue Bond Series 395 of the City of Dallas, Texas, Selling Monday, April 17, 1961, at 1:45 P.M. C.S.T.'

"Comparison of that schedule, which we understand was distributed through the United States Mail to prospective bond buyers, with the Published Annual Fi-

nancial Reports of the City of Dallas, Texas, for the fiscal years October 1, 1959-September 30, 1960 and October 1, 1960-September 30, 1961, clearly establishes that the published schedule falsely and fraudulently represents the revenues to be derived from Love Field, the forecasted expenses, the amount available for debt service, and the total debt requirements.

"The misrepresentation as to income is accomplished by a conversion from the established accrual basis of accounting to a cash basis; including in case 'Income' a non-recurring sale of capital assets amounting to \$16,373.28 (1959-1960 Report, p. 55); and excluding the excess of 'Other Expenses' over 'Other Income' amounting to \$121,592.61 (Idem). The accrual basis shows the Net Income for the Fiscal Year 1959-1960 produced by Love Field to have been \$702,801.32, whereas the [fol. 18] Schedule published by Mr. Coker reports a \$1,372,370 as available for debt service in that same year.

"An examination of Mr. Coker's statement as to the amount available for debt service shows that it contains no reserve for depreciation or replacement, which means that upon the basis of his figures, the City of Dallas will be required to issue general obligation bonds to finance the replacements which will become necessary within a few years. While it is common knowledge that as an installation ages, the cost of maintenance increases, the Coker schedule shows no increase in maintenance cost after the tenth year.

"The attached exhibit evidences that the Coker Schedule, offered to prospective bond buyers, understates the annual debt requirements as shown in the Official Annual Reports as follows: the understatement of requirements on the basis of the 1959-1960 Annual Report ranges from \$583,706 to \$2,090,400.00; on the basis of the 1960-1961 statement the understatement ranges from \$630,619 to \$2,090,400.00.";

all of which conclusively shows that the Plaintiffs in that cause, due to the public nature of the information, knew,

could have, and should have known of the same prior to the filing of the *Atkinson* suit in 1961. For that reason those issues are now foreclosed.

[fol. 48]

EXHIBIT "A" TO PETITION FOR WRIT OF MANDAMUS

No. 16,193

CITY OF DALLAS, et al., Petitioners,

vs.

DANIEL C. BROWN, et al., Respondents.

On Application for Writ of Prohibition.

City of Dallas, together with certain of its officials and other interested parties, Petitioners, seeks a writ of prohibition and ancillary orders against James P. Donovan and about 200 of his clients, Respondents, to prohibit Respondents from further prosecuting Civil Action No. 9276, styled Brown, et al. v. City of Dallas, et al. now pending in the United States District Court for the Northern District of Texas, Dallas Division.

Petitioners allege that the issues which Respondents present in their suit in the United States District Court are the same issues involving the same subject matter that have been previously adjudicated by this Court in the case of *Atkinson, et al. v. City of Dallas*, 353 SW 2d 275; and that the writ of prohibition is necessary to protect the previous judgment of this Court and its enforcement and execution.

The record discloses events leading up to or connected with Petitioners' application as follows:

1. On April 3, 1961 George S. Atkinson and others, owners of property near Love Field, a municipal airport located in the City of Dallas filed a class suit in the District Court of the State of Texas to restrain the City of Dallas

from the construction of a runway at the airport. The suit also attacked the validity of certain revenue bonds which the City was about to issue to finance construction of the [fol. 49] runway.

2. On July 17, 1961 a summary judgment was rendered in favor of the City denying the permanent injunction sought by the Plaintiffs.

3. On December 15, 1961 this Court on the appeal of the case, affirmed the above summary judgment. Motion for rehearing was overruled on January 19, 1962. A detailed statement of the points urged on the appeal will be found in 353 SW 2d 275.

4. On March 14, 1962 the Supreme Court of Texas denied a writ of error in the case with the notation "no reversible error", and announced that a motion for rehearing would not be entertained.

5. On June 25, 1962 the Supreme Court of the United States denied a writ of certiorari in the case, and on October 8, 1962 overruled a motion for rehearing. Thus the judgment of this Court of December 15, 1961 affirming the summary judgment of the trial court became final for all purposes, and the issues decided in our judgment of affirmance became res judicata.

6. On September 24, 1962 Respondents herein filed Civil Action No. 9276, styled Brown, et al. v. City of Dallas, et al. in the United States District Court. By this suit they seek a permanent injunction against the City, to restrain the City from building the runway and from issuing certain revenue bonds. They do not seek a temporary injunction, and none has been granted. Thirty of the plaintiffs in the United States District Court are the same persons who were plaintiff in the original suit filed April 3, 1961 in a District Court of Dallas County. Other plaintiffs, all alleged to be property owners, were added in the United States District Court.

7. On October 2, 1962 the City of Dallas filed the application for writ of prohibition which is now before us for [fol. 50] decision. The City asserts that the suit in the

United States District Court is merely an attempt to relitigate the issues which were adjudicated in our judgment of affirmance of December 15, 1961.

8. On October 6, 1962 Respondents filed an application in the United States District Court seeking to enjoin this Court from further considering or acting on the City's application for a writ of prohibition.

9. On October 10, 1962 the United States District Court dismissed Respondents' application for injunction to restrain this Court from further considering the City's application for a writ of prohibition.

Are the issues raised in the Civil Action No. 9276, styled Brown, et al. v. City of Dallas, et al. filed September 24, 1962 in the United States District Court the same as the issues adjudicated in our judgment of affirmance of December 15, 1961, which judgment became final when the Supreme Court of the United States on October 8, 1962 overruled a motion for rehearing? Petitioners contend that the issues are the same. Respondents contend that they are not the same.

After a careful consideration of the whole record a majority of our Court have concluded that it is not necessary for us to answer the above question in order to decide whether to grant or refuse the writ of prohibition sought by Petitioners. For it is our opinion that regardless of whether the issues are the same, there are other considerations which should and do cause us to decide that the writ ought to be refused.

Under Art. 1823, V.A.C.S. we are given authority to issue writs of mandamus and other writs only when necessary to protect our jurisdiction. State Farm Mutual Automobile Ins. Co. v. Worley, 346 SW 2d 407, 409. The pendency of Action No. 9276 in the United States District [fol. 51] Court does not invade our exclusive jurisdiction, though the issues in the suit may be the same as the issues decided in our judgment of affirmance. Ours is not the only Court which has jurisdiction to enforce a plea of res judicata in support of our judgment of affirmance of December 15, 1961. That defense may be and has been pled by the City in Action 9276 in the United States District

Court, and that Court has jurisdiction to hear and give effect to the plea.

Petitioners contend in effect our jurisdiction is invaded because Respondents have filed a suit in another Court in which Respondents try to ignore the finality of our judgment. And Petitioners further contend that the only way our jurisdiction can be protected and respected is by the issuance of a writ of prohibition restraining the litigants from further prosecuting their suit in the other Court where it is now pending. We do not agree to such contention. To agree would be equivalent to hold that the conclusiveness of a judgment could never be determined except by the Court that rendered it.

In a situation similar in most respects to the situation now before us our Supreme Court took note of the difference between an invasion of a court's jurisdiction and the mere filing of a suit in disregard of a prior judgment. We quote from the opinion by Justice Nelson Phillips in Milam County Oil Mill Co. v. Bass, 106 Tex. 260, 163 SW 577:

" * * * to disregard a judgment through the institution of a suit is not necessarily to obstruct its operation. True it may draw the judgment into question through the denial of its effect, and the judgment may be so conclusive as to render the suit a groundless one; but the jurisdiction of the court is not invaded by the [fol. 52] mere assertion of rights through such method, even in contravention of the judgment, so long as its operation is left unimpeded. If a court should entertain such a suit, and through want of jurisdiction or failure to accord to the judgment its legal effect render an erroneous decree, the remedy provided by our system for its revision and the readjudication, if needs be, of the conclusiveness of the judgment, is an appeal. (emphasis ours)

"We are not insensible to the hardship that such cases may sometimes impose, nor to the forcible argument of the able counsel for relators that litigation in relation to this estate, so prolonged as its history discloses, should end; but such considerations afford in themselves no ground for the closing of the doors of

the courts to suits, however ill founded, brought in evident good faith. • • •

"The power of a court to enforce its jurisdiction does not include an authority to prevent the prosecution of any suit to which a judgment of the court may be an effectual bar, but which, beyond presenting an issue as to the conclusiveness of the judgment upon the asserted cause of action, makes no attempt to disturb it, or to interfere with its execution or the exercise of rights established by it, as such a suit does not conflict with the exercise of that power which constitutes jurisdiction in the court, the power to hear and determine the cause and enforce the judgment rendered, and therefore does not violate its jurisdiction. The assumption of such right would invest a court not merely with the control of its own judgments and authority to enforce its jurisdiction, but with a further power to govern other courts in the exercise of their [fol. 53] lawful jurisdiction; and the result would be that the issue of the conclusiveness of a judgment upon what is urged as a distinct cause of action could never be determined except by the court that rendered it."

(emphasis ours)

The Supreme Court went on to say that the cases of *Hovey v. Shepherd*, 105 Tex. 237, 147 SW 224, and *Conley v. Anderson*, 106 Tex. 265, 164 SW 985 are not in opposition to the above expressed view. In both of them the suits which were prohibited, directly attempted to obstruct the execution of the judgments of the Supreme Court. In our opinion the same thing may be said of *Cattlemen's Trust Co. of Ft. Worth v. Willis*, 179 SW 1115.

In the instant case the United States District Court has done nothing to repudiate our judgment of affirmance; and we shall not assume that it will do any such thing. To the contrary we must assume that the United States District Court will give full effect to our judgment by sustaining a plea of res judicata if the issues before it should prove to be the same issues which we previously adjudicated. *State Farm Mutual Automobile Ins. Co. v. Worley*, 346 SW 2d 407, 409.

In the above cases it was further held that a writ of prohibition will not be granted where there is an adequate remedy at law, such as an appeal. This holding was in keeping with the holding of our Supreme Court in Milam County Oil Mill Co. v. Bass, *supra*, wherein it was held, "that if a court should entertain such a suit and *** render an erroneous decree, the remedy *** is an appeal." See also *Clark v. Ewing*, 196 SW 2d 53, 55.

Petitioners in the instant case allege that to pursue this cause in the United States District Court would involve hardships due to delay incident to a probable appeal by Respondents to the Circuit Court of Appeals and thereafter an attempt to obtain a writ of certiorari from the Supreme Court of the United States. While such proceedings are pending delivery of the revenue bonds will be held up, for bond buyers will not purchase bonds while legal proceedings involving the bonds are pending. This may be true, but as stated in the Milam County case, consideration of hardships do not afford grounds for the closing of the doors to suits, however ill founded, brought in good faith.

It is with regret that the majority of our court feel impelled under the circumstances to decline to order the writ of prohibition to issue. But our duty as we see it is to refuse Petitioners' application.

Petitioners' application for a writ of prohibition is refused.

Dixon, Chief Justice.

Young, Associate Justice dissents.

Dated: October 24, 1962.

[fol. 55]

EXHIBIT "B" TO PETITION FOR WRIT OF MANDAMUS

No. 16,193

CITY OF DALLAS, ET AL

Petitioners,

vs

DANIEL C. BROWN, ET AL

Respondents.

Dissenting Opinion

In my opinion, the writ of prohibition, pursuant to Art. 1823, V.A.C.S., should issue on the City's plea of res judicata—the validity of Love Field Revenue Bonds having already been established in the Atkinson suit by final judgment of this Court and confirmed both by the Supreme Court of Texas and the United States Supreme Court. "The doctrine of 'res adjudicata', or estoppel by reason of a former judgment, rests upon the principle that a cause of action which has been once determined upon its merits by a competent tribunal, between parties over whom that tribunal had jurisdiction, cannot afterwards be litigated by them in another proceeding, either in the same or different tribunal," Words & Phrases, Per. Ed. Vol. 37, p. 146.

Of these Revenue Bonds, Series No. 395 in amount of Eight Million Dollars were involved in the Atkinson case which could not be sold and delivered by reason of that litigation. On final adjudication of the Atkinson case as recited in the majority opinion, the City then continued a financing of the construction of the Love Field Runway by issuance of the same General Revenue Bonds, Series No. 401, but in the lesser amount of Five Million Dollars, to be sold September 24, 1962; on which date the Respondents filed another Civil Action in Federal Court, No. 9276, styled

Daniel C. Brown, et al. v. City of Dallas, et al., again seeking permanent injunction against the sale of these bonds. [fol. 56] No temporary injunction was sought and none was necessary, for, due to the unique nature of bonds and bond issues the mere filing of suit in Federal Court would have that effect.

Courts of Civil Appeals may protect its jurisdiction by writ of prohibition or injunction against maintenance by defendants to the judgment of a suit in another tribunal *attacking the validity of the original judgment or seeking to enjoin its execution.* See Long v. Martin (Sup. Ct.) 287 SW 494. Does Respondents' suit in the Federal Court have this emphasized effect? It undoubtedly does.

Our Supreme Court of course, recognizes the doctrine of *res adjudicata* and has permitted this prohibitory writ to issue in all instances where the operation of the prior judgment or its execution has been directly interfered with, but not so (as in City and County of Dallas v. Cramer, Judge, 207 SW 2d 918) where "Relator would be left undisturbed, except by the annoyance of the suit, in the full enjoyment of the rights secured by the judgment of this Court." Obviously the case of Milam County Oil Mill Co. v. Bass, 163 SW 577, was of the latter class; the Supreme Court stating that the cause of action there asserted "makes no attempt to disturb it (the prior judgment) or to interfere with its execution or the exercise of rights established by it."

Judge Phillips further states in Milam County Oil Mill Co. v. Bass, supra, that: "The power to enforce its judgments necessarily inheres in a court as an essential attribute of its jurisdiction, but there is a manifest difference between the enforcement of a judgment and the prevention of a suit which makes no attempt to obstruct its execution, but denies its conclusiveness upon what is alleged to be [fol. 57] another cause of action. * * * The jurisdiction of the court is not invaded by the mere assertion of rights through such method, even in contravention of the judgment, so long as its operation is left unimpeded. * * *". (emphasis mine) And in Houston Oil Mill Co. of Texas, et al. v. Village Mills Co. et al., 71 SW 2d 1087 the Supreme Court, referring to Milam County Oil Mill Co. v. Bass,

supra, stated: "In that case it is by no means clear that the judgment sought in the Hill County suit, the second suit, would directly interfere with the operation of the prior judgment of this court."

The majority does not and cannot say that this second suit of Brown, et al. v. City of Dallas, et al., is not a renewal of the litigation foreclosed in the Atkinson case, the mere filing of which constitutes such a cloud upon the title to these general Revenue Bond issues as to preclude their sale. In the situation thus presented, the majority merely begs the question by their negative ruling on the application for writ of prohibition; concluding as they do that a plea of res adjudicata can as well be sustained by the Federal District Court, and such indeed may be the ruling of Judge Sarah T. Hughes. Even so, the door will be opened for full scale relitigation of the validity of these bonds in another trial court, on through the United States Circuit Court of Appeals and again to the Supreme Court of the United States. On the other hand a grant of the relief prayed for by the City of Dallas will finally terminate this prolonged litigation, save for a possible appeal to the Supreme Court of Texas.

The legal maxim of "justice delayed is justice denied" is truly relevant to the adjudicated rights of Petitioner City of Dallas.

YOUNG, Associate Justice

Delivered:
October 29, 1962

[fol. 58]

EXHIBIT "C" TO PETITION FOR WRIT OF MANDAMUS
COURT OF CIVIL APPEALS

FIFTH SUPREME JUDICIAL DISTRICT

JUSTIN G. BURT, Clerk

Dallas, Texas, November 23, 1962

Mr. H. P. Kueera;
Dallas, Texas.

Sir:

You are hereby notified that, in the case of City of Dallas, et al, Petitioners vs. Daniel C. Brown, et al, Respondents our No. 16,193, from Dallas County, the following decision and order was this day made and entered by this Court:

Petitioners motion for rehearing was overruled.

Mr. Young, Associate Justice, dissents.

Respectfully yours,

JUSTIN G. BURT, Clerk,
Court of Civil Appeals, Fifth Supreme
Judicial District of Texas

[fol. 59]

EXHIBIT "D" TO PETITION FOR WRIT OF MANDAMUS
No. 59027-H

IN THE 101ST JUDICIAL DISTRICT COURT OF
DALLAS COUNTY, TEXAS

GEORGE S. ATKINSON, et. al.,

Plaintiffs,

vs.

CITY OF DALLAS, TEXAS

Defendant.

PLAINTIFFS' FIRST AMENDED ORIGINAL PETITION

To Said Honorable Court:

Come now Plaintiffs in the above entitled and numbered cause, and pleading jointly and severally in their own behalf, and as representatives of the class consisting of all home owners whose residences are situate within the area comprising the proposed approach and departure paths of a planned instrument runway, identified by the Defendant City of Dallas, in a plan filed with the Federal Aviation Agency under date of November 17, 1960, as Runway 13R/31L, the members of such class being so numerous as to make it impracticable to bring them all before the Court, respectfully show this Court as follows:

1.

That the Plaintiffs are resident tax payers of the City and County of Dallas, State of Texas, and owners of homes and real property situate at the addresses set opposite their names in the following schedule:

Paul A. Crick—9615 Overlake Drive;

Dr. Hobson Crook—9631 Overlake Drive;

George H. Harmon—9600 Overlake Drive;

[fol. 60] James H. Parr—9525 Overlake Drive;

Martin E. Collis, Jr.—9515 Overlake Drive;
J. W. Slaughter—9530 Overlake Drive;
James E. Strum—9706 Overlake Drive;
Floyd R. Raupe—9730 Overlake Drive;
George S. Atkinson—2923 Northwest Highway;
Vernon C. Pampell—3038 Northwest Highway;
Paul H. Crawford—2747 Bachman Drive;
E. T. Busch—2829 Bachman Drive;
V. C. Bilbo—2730 Bachman Drive;
W. H. Richardson—2755 Bachman Drive;
Austin Crow—2807 Bachman Drive;
J. O. Garrett—2801 Clydedale;
E. W. Quinton—2930 Clydedale Drive;
Dr. Grant Boland—2831 Clydedale;
L. E. Dease—2833 Kendale Drive;
H. P. McDonald—3001 Kendale Drive;
M. J. Pellillo—2830 Kendale Drive;
J. D. Lowrie—3018 Kendale Drive;
S. R. Kirby—2803 Kendale Drive;
Charles Williamson—3061 Cridelle Drive;
Jean Shaw—3045 Cridelle Drive;
W. Claude Jones—9715 Starlight;
James W. Odom—2624 Community Drive;
Reveau & Virginia Bassett—3155 Timber Lane;
Walter Sodeman—3320 Inwood Road;
Mr. & Mrs. O. L. Whitman—3324 Inwood Road;
Mr. & Mrs. J. Walter Long, Jr.—3312 Inwood Road;
Mrs. Charles J. Butler—3307 Cherrywood;
C. H. Asel—3018 Inwood Road;

[fol. 61] together with the following named persons joined herein as Plaintiffs with leave of Court:

Lee R. Slaughter—9507 Overlake Drive;
Frank Grimes—3050 Community Drive;
Winston C. Jones—2939 Clydedale;
C. O. Crudgington—3033 Cridelle Drive;
Daniel C. Brown—3064 Cridelle Drive;
J. W. Tomlin—3050 Norwalk;
William Darrell Graves—2742 Bachman Blvd.;
George B. Lotridge—5422 Bradford Drive;
Lloyd S. Carter—2700 West Northwest Highway.
Arthur E. Tappan—2928 Northwest Highway

2.

That included in the class which Plaintiffs represent are the home owners, families and individuals who live, work, reside and attend schools, churches and other community centers in the area embraced within the approach areas of planned runway 13R/31L; that the persons constituting this class number in the thousands making it impracticable to bring them all before the Court; that the named Plaintiffs and the class they represent have several rights, affected by a common question of law and fact, and a common relief is sought.

3.

That the Defendant, City of Dallas, is a municipal corporation, duly chartered under the laws of the State of Texas, and the owner and operator of an airport designated as "Love Field" located wholly within the limits of the City of Dallas, Dallas County, Texas.

4.

That Love Field, as it presently exists, has two runways [fol. 62] used for the landing and take off of aircraft of

various types including jet propelled planes; the one runway generally used for jet aircraft runs northwest and southeast, while the second shorter runway runs generally north and south.

5.

That in March of 1960, the application of the Defendant City of Dallas for Federal aid in the construction of a new runway designated 13R/31L, 8000 feet in length, 3,000 feet to the southwest of and parallel to the existing Northwest/Southeast runway was rejected by the Federal Aviation Agency as not conforming to Federal Standards for, among other reasons, lack of adequate clear zones as specified by Federal Standards; the proposed 8,000 feet runway was inadequate to meet indicated ultimate needs; and the proposed approach and departure paths of said planned runway would pass directly over a thickly populated residential area including numerous schools, churches, hospitals and other places of public assembly.

6.

That thereafter the Defendant City of Dallas gave notice to the Federal Aviation Agency of its intention to construct runway 13R/31L without the use of Federal Funds, as an instrument runway with a length of 8,800 feet; and March 24, 1961 obtained a Federal Aviation Agency clearance from the standpoint of airspace utilization but not from the standpoint of compliance with Federal Standards as to construction of the proposed runway.

7.

That the Defendant City of Dallas proposes to build and use the new runway for the purpose of providing additional [fol. 63] facilities at Love Field for the landing and take off of all types of aircraft including jets, which use will necessarily result in the seizure and taking of Plaintiffs' air rights over and above their respective properties for an alleged public use.

8.

That the Defendant City of Dallas has made no provision for the acquisition of Plaintiffs' air rights either by purchase or condemnation and proposes to take and seize such rights for an alleged public use without compensating Plaintiffs therefor, all in violation of the provisions of the Constitution of the United States of America, Amendments V and XIV, the Constitution of the State of Texas, Article 1, Section 17 and Articles 3264 through Article 3271 of the Texas Revised Statutes of 1925 as amended.

9.

That the Defendant City of Dallas proposes to install and use the proposed runway under the authority vested in it as a municipality by the Texas Municipal Airports Act, Article 46D et seq., Texas Revised Statutes as Amended.

10.

That the Texas Municipal Airports Act, Article 46d-2(d) provides as follows: "Limitation on Design and Operation of Air-Navigation Facilities. All air navigation facilities established or operated by municipalities shall be supplementary to and co-ordinated in design and operation with those established and operated by the Federal and State Governments.;" that Article 46d-7(B) of said Texas Municipal Airports act provides: "Conformity to Federal [fol. 64] and State Law. No ordinance, resolution, rule, regulation or order adopted by a municipality pursuant to this Act shall be inconsistent with, or contrary to, any Act of the Congress of the United States or laws of this State, or to any regulations promulgated or standards established thereto."; and that the new runway proposed to be built and used by the Defendant City of Dallas is an air navigation facility within the definition of said Texas Municipal Airports Act.

11.

That the action of the Defendant City of Dallas in constructing the proposed runway is ultra vires, void, illegal,

and contrary to law in that the proposed runway fails to comply with established regulations and standards established, pursuant to Act of Congress, and is not coordinated in design and operation with airports established and operated by the Federal Government in the following respects:

1. The proposed runway is not coordinated in design with the technical standards and design criteria established in the Federal Aviation Agency Planning Series No. 3 published September 2, 1960 in that the most critical areas, those in the runway approach and departure paths, are presently thickly populated residential areas, occupied by schools, churches, hospitals and numerous places of public assembly.
2. The plan for the proposed runway submitted to the Federal Aviation Agency on the basis of the Master Plan approved in 1948, to obtain air space clearance, failed to include a showing of runway clear zones as required by Federal Aviation Agency Regulations Part 550.38 effective November 18, 1960.
- [fol. 65] 3. The proposed runway plan wholly fails to provide clear zones at each end of said runway as required by Federal Aviation Agency Regulation 550 Subchapter D, effective November 18, 1960.
4. The proposed runway plan fails to comply with the Standards established by Technical Standard Order TSO—N6b as issued by the Administrator of Civil Aeronautics, accepted and approved by the Federal Aviation Agency.
5. The proposed runway if constructed will not comply with the standards of the Federal Aviation Agency as published in Technical Standard Order TSO—N18 as amended entitled "Criteria For Determining Obstructions to Air Navigation" in that there presently exist objects which project above the landing area and all referenced imaginary surfaces described in Section "A" of said Technical Standard Order which constitute obstructions to navigation as defined therein; and said runway further fails to comply with said Technical Standard Order, Section "B" in that there are numerous obstructions to navigation existing in the instrument approach zone which constitute

airport hazards and public nuisances within the definitions of Airport Zoning Regulations as set forth in Airport Zoning Regulations, Article 46e-1 and Art. 46e-2 of the Revised Statutes of Texas.

6. The proposed runway fails to comply with Federal Aviation Agency Airport Engineering Data Sheet, Item No. 24 issued August 17, 1959 on the Subject: "Airport Design Recommendations" in that it does not provide the necessary clearances recommended therein.

[fol. 66] 7. The proposed runway fails to meet Federal Standards of construction, design and operation in that the layout of said runway in relation to the existing runway will not permit both to be used to expedite instrument weather traffic.

8. The proposed runway fails to comply with the Standards established by the Technical Standard Order TSO—N14 issued May 24, 1949 by the Administrator of Civil Aeronautics and adopted by the Federal Aviation Agency as its Technical Standard Order on the Subject of Airport Traffic and Taxi Patterns.

9. The proposed runway fails to comply with the requirements of Technical Standard Order TSO—N24 issued by the Administrator of Civil Aeronautics and adopted as part of its Regulations by the Federal Aviation Agency on the subject of approach lighting.

10. The proposed runway fails to comply with or make provision for meeting the requirements of Federal Aviation Agency Standards as set forth in Technical Standard Order TSO—N25 as to Obstruction Lighting, Basic Requirements.

11. The proposed instrument runway fails to meet Federal Standards in that it would require a glide angle in excess of the established angle of 2.84° , established by the Federal Aviation Agency as the maximum of glide angle safety, because of obstructions to navigation within four miles of the end of the runway.

12. The electronic interference from buildings, railroad tracks and other obstructions existing in violation of rec-

ommended clearances would prevent compliance with established Standards and designs for instrument landing [fol. 67] systems, resulting in glide path and localizer roughness in the vicinity of an area approximately 5 miles from the Southeast end of the proposed runway:

That the foregoing failures of the Defendant to comply with the Standards of airport construction and to coordinate the proposed navigational facilities in design and operation will necessarily cause Plaintiffs irreparable damage when said facilities are placed in operation by the Defendant.

12.

That the construction and operation of the runway proposed to be built by the Defendant have resulted in and will necessarily result in creation of the following conditions effecting lives and property of the Plaintiffs:

1. by joint action of the Federal Aviation Agency and the Federal Housing Administration insurance of mortgages by the latter will be refused or substantially reduced as to Plaintiff's properties lying within 25,000 feet of either end of the proposed runway, said action being confirmed by the Federal Housing Administration by Letter to Director of All Field Offices No. F-177, dated May 3, 1961;
2. the sale and rental value of Plaintiffs properties will be dissipated by existing and potential hazards of low flying aircraft and the nuisance of noise substantially increased by the ever developing use of jet aircraft;
3. Plaintiffs' right to the quiet enjoyment of their homes, schools, and churches will be permanently and effectively destroyed;
4. the excessive noise generated by jet aircraft upon take-[fol. 68] off and landing will cause Plaintiffs both physical and mental distress and will expose Plaintiffs to an unusual and extreme danger of permanent mental and physical injury;
5. the properties of Plaintiffs will be exposed to abnormal hazards of damage due to severe vibrations and expulsion

of waste resulting from the landing and takeoff of jet aircraft in the immediate vicinity of their homes;

6. the operation of jet aircraft from the proposed runway will result in exposing Plaintiffs and their families to abnormal and unusual hazards of life and limb in their homes, schools, churches and other community centers, and will place their lives and health in continuous jeopardy;

7. the operation of jet aircraft over and above the public and private schools situate in the approach area will seriously hamper programs of instruction, interfere with public education and place the lives and physical well being of students and teachers in constant peril;

All of which conditions will result in irreparable damage to these Plaintiffs as a necessary consequence of operations to be conducted from the proposed runway.

13.

That the establishment of the proposed runway and the operations planned to be conducted therefrom will create a public nuisance, necessarily causing and resulting in the situation and conditions hereinafter described:

1. Plaintiffs will be exposed to an abnormal risk of death and serious injury by reason of the operation of jet and large propeller aircraft over and in the vicinity of their homes, schools, hospitals and churches [fol 69] in disregard of the minimum standards of safety in such case made and provided;

2. Plaintiffs will be subjected to physical suffering and mental distress by the excessive noise generated by jet planes landing on and taking off from the runway, constructed in violation of Federal Standards of construction;

3. Plaintiffs' health will be seriously impaired by reason of the excessive noise generated by landing and departing planes;

4. Plaintiffs will be denied the right of quiet enjoyment of life and property in a normal manner by reason of the operation of jets and other powerful air-

craft over their residential area and community schools and churches;

5. the value of Plaintiffs homes for residential purposes will be seriously depreciated or wholly dissipated by reason of the air traffic generated by the construction and operation of the proposed runway;

6. the ability of Plaintiffs and their successors in title to obtain reasonable financing incident to improvement or sale of their properties will be either seriously impaired or wholly negated;

7. the rental value of Plaintiffs properties will be seriously reduced or altogether extinguished.

8. the properties of Plaintiffs and schools and churches in the approach area will be subject to continuing damage by excessive vibration resulting from [fol. 70] the air traffic generated and the expulsion of jet waste causing discoloration of buildings, and offensive odors;

9. an established existing residential area will be subjected to a use of a commercial or industrial nature in violation of existing zoning laws of the City of Dallas and deed restrictions of record in the Dallas County Clerk's office;

10. Plaintiffs will be subjected to excessive risk of death and injury and property damage resulting from failure of light aircraft to successfully take off from or land on the proposed runway;

11. Persons employed in industrial plants situate within 2500 feet of the ends of the proposed runway will be placed in great jeopardy of life and health from low flying aircraft including those which are jet propelled;

12. the orderly process of instruction and education will be seriously impaired and interfered with by the operations proposed, and the life and health of thousands of children attending schools in the area will be placed in serious jeopardy;

13. an already congested traffic situation on highways in the vicinity of Love Field will be made more dangerous through the distraction resulting from low flying aircraft, and the general safety of persons moving in vehicular traffic greatly imperiled;

Which situation and conditions as detailed above are necessary consequences of the construction and operation of the proposed runway, however skillful said operation may be.

[fol. 71]

14.

That the runway proposed to be built by the City is not a public necessity or convenience nor will the public interest be served thereby for the following reasons:

1. the present facilities of Love Field are capable of handling operations involving the arrival and departure of aircraft at the rate of 50 to 60 movements per hour and in the past have handled up to 90 movements per hour;
2. the number of scheduled movements per day of air carriers of freight and passengers averages approximately 360 at Love Field;
3. the proposed runway will not expedite air traffic because it can not be used simultaneously with the existing runway for movement of aircraft;
4. Less than 36% of the aircraft movements at Love Field are instrument operations;
5. Only approximately 56% of present movements at Love Field involve public aircraft carriers of freight and passengers flying on schedule; 1% involves airforce and naval aircraft and 43% of all movements is accounted for by private aircraft which could be accommodated at other Dallas County Airports;
6. the present policy of the Federal Aviation Agency is to reduce the number of flights to separate air carrier airports in cities sufficiently close to be served by one airport and an application is already on file with the Civil Aeronautics Board requesting that service between Dallas and Fort Worth and New York/Newark and Washington be

provided through either Love Field or Amon Carter Field to the exclusion of one or the other;

[fol. 72] 7. a municipal airport of like service classification to Love Field and with facilities in excess of public demand therefor is located within twelve miles of Love Field and is strategically located to serve the City of Dallas in air commerce;

8. that the simultaneous use of parallel runways in the manner proposed by the Defendant which has not been approved by the Federal Aviation Agency will increase the danger of mid-air plane collision in case of abortive landing by an incoming aircraft, to the detriment of the air passengers, and persons and property within the established approach area.

15.

That the action of the Defendant City of Dallas in proposing to build and put the new runway into operation is arbitrary and capricious and contrary to the public interest for the following reasons:

1. that said Defendant does not have in its permanent employment a qualified engineer competent to determine the desirability or practicability of maintaining Love Field as a major air field within the geographical limits of the City of Dallas;

2. that in a report of City Planner Harland Bartholomew presented to the Council of the City of Dallas under date of September 1943 Mr. Bartholomew stated: "Love Field is surrounded by commercial, industrial, and residential developments, and the cost of any extension would be very high if not prohibitive * * * This failure to provide enough land area has been the most serious mistake in nearly every city where major airports have been developed * * * The site must not interfere with existing [fol. 73] and probable future urban areas. If air transportation develops as expected, it will be necessary to adopt rigid rules regarding the operation of airplanes over developed urban areas because of the noise, confusion and possibility of accidents. For this reason airports,

particularly the major airports, should be located outside the future urban area in order to minimize the adverse effects on possible developments *** Love Field is now located in a fully urbanized area, and the anticipated aeronautical use of this field would be very detrimental to proper development of this section of the City. It is also possible that operations at Love Field could be limited and coordinated with the new site. Under this arrangement Love Field could be maintained as a manufacturing and service field with strictly limited regulations regarding landings and takeoffs."

3. In a deed from the United States Government to the Defendant City of Dallas of a portion of the land comprising the present Love Field, under the Surplus Property Act of 1944 the United States incorporated a restriction running with the land imposing an obligation on the grantee to clear and protect the aerial approaches to the airport and to prevent the establishment or creation of future airport hazards, said deed having been given to the Defendant City in 1946;

4. The City of Dallas agreed in connection with its acceptance of Federal Aid for Airport Development to clear and protect the aerial approaches to the airport and to prevent the establishment or creation of future airport hazards, and the Defendant City in connection with one of its Federal grants was specifically advised that the final payment of 10%, under the Federal grant would not be [fol. 74] made unless the approach areas "have been protected by the adoption of a zoning ordinance or regulations or by securing navigation easements or otherwise prohibiting the creation, establishment, erection or construction in such areas of airport hazards to the extent provided" in CAA recommended Standards or to such reduced Standards as might be approved by the CAA.

5. That the information set forth in the preceding two paragraphs was called to the attention of the Council of the City of Dallas in the report filed by James C. Buckley, Inc., Terminal and Transportation Consultants under date of March 24, 1952.

6. That in 1948 the City of Dallas approved a Master Plan for Love Field which included parallel Northwest/Southeast runways of a length of 6,250 feet, which plan continued in effect until 1954 when the City altered said plan to provide for the extension of these runways to a maximum length of 8,500 feet.

7. That since the City of Dallas has had authority to exercise zoning powers over the lands owned and occupied by Plaintiffs said lands have been zoned residential and as of this date carry that classification.

8. That the City of Dallas through its building inspector issued permits to the Plaintiffs and their predecessors in title specifically authorizing construction of their existing residences.

9. That the Defendant City of Dallas, never passed an Airport Zoning Ordinance until January of 1955.

10. That since January 1959 the Defendant City of Dallas has permitted jet aircraft to land and takeoff from Love Field in violation of the express prohibitions of the Dallas City Code Sections 30-1 and 30-2 which expressly [fol. 75] prohibit noises detrimental to life or health and noises interfering with enjoyment of property or public peace and comfort;

That the construction and operation of the proposed runway will necessarily cause and result in further violations of the cited code provisions;

11. That the City Council has repeatedly in the past and continues in the present to ignore the recommendations of its Terminal and Transportation Consultants, and the Federal Aviation Agency that further development of Love Field and other airports in the vicinity be made under a regional airport plan in the public interest.

12. That the City of Dallas has only a defeasible title to Love Field Airport.

That the City of Dallas has not effectively enforced its Airport Zoning Ordinance.

16.

That the Defendant City of Dallas has approved the letting of a contract for the construction of the planned runway and called for bids on a proposed issue of revenue bonds which action is unconstitutional, illegal, and void for the following reasons:

1. The Constitution of the State of Texas limits the purposes for which municipal bonds may be issued, denies the legislature power to authorize any city to lend its credit or grant public money or thing of value in aid of any individual, association and corporation, and requires that bonds may be issued only upon a vote of a two-thirds majority of the resident qualified taxpayers, all as provided in Article 3, Section 52 of said Constitution;

2. That Article 701 of the Revised Civil Statutes of Texas provides that the bonds of a county or an incorporated [fol. 76] rated City shall never be issued for any purpose unless a proposition for the issuance of such bonds shall have first been submitted to the qualified voters who are property taxpayers of such county, city or town;

3. Article 11, Section 7, of the Constitution of the State of Texas provides that no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent (2%) as a sinking fund; and the condemnation of the right of way for such works shall be fully provided for;

4. That Article 46d-9 of the Revised Statutes of Texas, a portion of the Texas Municipal Airports Act, provides in part as to financing airport improvements that "For such purposes a municipality may issue general or special obligation bonds, revenue bonds or other forms of bonds, secured or unsecured, including refunding bonds, and levy taxes to provide for the interest and sinking funds of any bonds so issued, the authority hereby given for the issuance of such bonds and levy and collection of such taxes to be exercised in accordance with the provisions of Title 22 of the Revised Civil Statutes of Texas,

Article 701 et seq., and Acts amendatory thereof or supplementary thereto."

5. The Charter of the City of Dallas, Section 288 provides that the total bonded indebtedness of the City shall never exceed the sum of one hundred thirty-five million (\$135,000,000.00) Dollars, and that any issue in excess of said sum shall be void as to such excess.

[fol. 77] 6. The Charter of the City of Dallas, Section 289 provides in part: "Any proposition to issue new or additional bonds, as authorized herein, as well as the amounts of such issuance and the purpose of the same, shall be first submitted to a vote of the qualified voters of the City of Dallas who are property taxpayers of the City, at an election for that purpose."

7. That the bonded indebtedness of the City of Dallas is presently in excess of \$160,000,000.

8. That no election has been held in the City of Dallas relative to the proposed improvement of Love Field through the construction of the new parallel runway, nor has the proposition for the issuance of revenue bonds for the purpose of paying for such improvement ever been submitted to the vote of the qualified taxpayers of the City of Dallas.

9. That the revenues from Love Field both present and future are inadequate to defray current expenses and amortize the indebtedness of the City resulting from the purchase and development of said Field.

10. That all State Statutes purporting to authorize the issuance of revenue bonds without approval by a vote of the people are unconstitutional and void.

11. That all State Statutes, and particularly Article 1269-J-5 of the Revised Civil Statutes of Texas which purport to avoid constitutional limitations by attempting to redefine the meaning of the word "debt" as used in the Constitution of the State of Texas, are unconstitutional and void.

[fol. 78] Wherefore, Plaintiffs pray that the Defendant City of Dallas be permanently enjoined from construction

of a Northwest/Southeast runway parallel to the existing runway at Love Field, Dallas, Texas; that the Defendant City of Dallas be permanently enjoined from issuing any municipal bonds except those which are authorized by the Constitution of the State of Texas; that the Defendant City of Dallas be permanently enjoined from lending its credit and/or granting public funds or other things of value in aid of individuals, associations, or corporations; that the Defendant City of Dallas be permanently enjoined from issuance of any bonds until the proposition relative to such issuance has been approved by a vote of the qualified taxpayers of said City; that the Defendant City of Dallas be permanently enjoined from submitting a proposal for the issuance of new or additional bonds to a taxpayers' election when such proposal would increase the City's total of bonded indebtedness to an amount in excess of \$135,000,000; and that Plaintiffs recover their costs of suit and have such other and further relief as they may be entitled to in the premises..

/s/ JAMES P. DONOVAN
James P. Donovan
ATTORNEY FOR PLAINTIFFS
30½ Highland Park Shopping Village
Dallas 5, Texas

[fol. 79]

State of Texas
County of Dallas

On this 22nd day of June 1961, personally appeared before me, James P. Donovan, who being by me first duly sworn, did depose and say that he is the Attorney of Record for Plaintiffs in the above entitled and numbered case, that he has read the foregoing Plaintiffs' First Amended Original Petition and knows the contents thereof, and that the allegations therein contained are true and correct.

/s/ JAMES P. DONOVAN

Subscribed and sworn to before me this 22nd day of June, 1961.

/s/ LOHRIENE L. BOWMAN
Notary Public, Dallas County, Texas

[fol. 80]

EXHIBIT "E" TO PETITION FOR WRIT OF MANDAMUS

FILED

Time

JUL 12 1961

BILL SHAW

Dist. Clerk, Dallas Co., Texas
..... DeputyIN THE 44TH JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

No. 59027-H

GEORGE S. ATKINSON, et al.

vs.

CITY OF DALLAS

DEFENDANT'S MOTION TO DISMISS AND ANSWER TO PLAINTIFFS'
FIRST AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES Now the City of Dallas and in answer to Plaintiffs' First Amended Original Petition requesting the Court for a permanent injunction would show the Court as follows:

I.

Defendant moves the Court to dismiss this petition because:

(A) It appears as a matter of law that the City of Dallas is attempting to improve Love Field, which is a City of Dallas owned airport, which it is authorized to own and, operate under and by

virtue of State Statutes, and that the contemplated improvements are of a permanent nature, and for that reason as a matter of law the construction of the improvement cannot be enjoined.

- (B) Whether or not the improvement should be erected is within the discretion of the City Council, where the responsibility for such a decision is placed by law, and it is not within the jurisdiction of the Court to substitute its judgment, or the judgment of the Plaintiffs as to whether or not the improvements should be constructed and made available for the public use.
- (C) The allegations of the Plaintiffs' petition disclose on their face that the contemplated act of improving and constructing a new runway will not invade any part of the land of the Plaintiffs, [fol. 81] nor will they be dispossessed by the construction of the proposed improvement.
- (D) The allegations of the Plaintiffs' petition show on their face that the construction of the runway on the property of the City of Dallas will in no way invade or dispossess the Plaintiffs of their properties, and that the same could not, as a matter of law, give rise to a cause of action in the nature of a taking within the provisions of the Texas Constitution.
- (E) Since the City of Dallas has been authorized by the Legislature to own, operate and improve an airport, and to operate the same as a governmental function, it appears, as a matter of law, that it is not within the province of the court to enjoin the performance of a duty imposed upon it by the act of the Legislature.
- (F) It appears from the Plaintiffs' petition that the Plaintiffs are anticipating or entertaining fears that their property will be damaged by reason of not the construction of the improvement, but of the subsequent use thereof, and as such it is

not within the province of the court to allay idle fears.

(G) It appears from the face of the Plaintiffs' petition and the prayer contained therein that the granting of the injunction by this court would be anticipatory of alleged illegal actions on the part of the City Council of the City of Dallas in constructing a project that was neither approved by or conforming to the requirements of the Federal Aviation Agency, as may be required and exclusive jurisdiction and control over who lands and who takes off from said airport.

(H) Plaintiffs' petition on its face shows that it is [fol. 82] brought as a class suit, and that the alleged injuries which they anticipate will occur will be a common one such as is suffered by all owners of property within the general vicinity of the airport, and as such states no cause of action.

(I) The Plaintiff's petition shows on its face that the acts complained of and which they allege will injure them in the future are acts of individuals, corporations, or others over which the City of Dallas, this Defendant, has no control but are under the sole control of the Federal Aviation Agency.

(J) Because it appears from the face of Plaintiffs' petition that they are anticipating a damage sometime in the future and as such they have an adequate remedy at law should such damage occur as a result of the construction of the proposed runway and improvements connected therewith.

(K) Because it appears from the face of Plaintiffs' petition that they and each of them are private citizens and home owners without authority to speak for the school board or the churches represented in the area. That there are no allegations

and no showing of any right to represent the churches or the schools and no showing of any right on the part of these plaintiffs to include the churches or schools or any of them as parties of this lawsuit.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the petition for a permanent injunction be denied, and the cause dismissed.

Respectfully submitted,

[fol. 83]

H. P. Kucera
N. Alex Bickley
Thomas B. Warren

By: _____
Attorney for Defendant, CITY OF DALLAS

Subject to the foregoing motion and without waiving same, Comes Now the Defendant, City of Dallas, and by way of an answer and reply to Plaintiffs' First Amended Original Petition for a permanent injunction, would show the Court as follows:

I.

Defendant denies each and every, all and singular the allegations contained in Plaintiffs' First Amended Original Petition, and demands strict proof of same.

II.

Defendant says that the allegations contained in Paragraph 5 of said Amended Petition are immaterial and irrelevant for any purpose because the City of Dallas, under the present projected improvement, is not seeking any Federal subsidies or grant and by reason thereof, it does not have to comply with the alleged Federal standards because such standards apply only to projects in which the Federal Government participates in the cost. In this connection, under the Federal Aviation Act the City of Dallas can own and improve an airport without compliance with

the so-called Federal standards, and airports, such as Love Field, can be utilized for commercial air traffic under the rules and regulations established for that purpose in that the Federal Aviation Agency controls all the traffic and gives clearance on all landings and take-offs on such runways as it deems safe. In this connection your Defendant says that all traffic at Love Field is, and for many years has been, under the control of the Federal Aviation Agency and that Love Field has been utilized for jet air travel, together with other commercial aircraft and that the Federal Aviation Agency approves and certifies the field as safe for utilization by commercial aircraft and airlines. [fol. 84] for freight, express, mail and passenger use. Also the Federal Aviation Agency Administrator, under Title 49, V.S.C.A., Section 1350, is authorized to approve or disapprove air space and that he has done as alleged by the Plaintiffs in this cause, and by reason of such approval of the air space, not only for the existing runways but for the proposed runways, the operation of the airport can be operated without violating any Federal or State regulation.

III.

Defendant denies that the landing of any aircraft or jet upon the proposed runway will seize or take Plaintiffs' property or rights and on the contrary your Defendant would show that there will be no physical taking of Plaintiffs' property and if they will suffer any damages, if any, which your Defendant denies, by reason of the operation of the runway when constructed and used for landing and taking off of aircraft, Plaintiffs have adequate remedy at law.

IV.

Defendant denies that there is any law or requirements under the State or Federal statutes which would compel the City of Dallas, prior to the building of the runway, to condemn and pay damages in advance for the property of the Plaintiffs for any damages which they anticipate they will suffer.

V.

Defendant denies the allegations in Paragraph 10, and on the contrary would say that the City of Dallas can own and improve said airport without violating any Federal or State law whatsoever.

VI.

Defendant denies ad seriatum all of the allegations contained in Paragraph 11 of the various subsections thereto and on the contrary your Defendant says that none of the alleged violations are material to the controversy for the reason that the Defendant, City of Dallas, is not seeking or asking any Federal participation in the cost of such [fol. 85] improvements. Furthermore, as alleged by Plaintiffs, the City of Dallas has obtained approval of the air space from the Federal Aviation Agency, needed for the construction of the proposed runway and that under the Federal Aviation Act of 1958 Love Field can be operated safely as it has been in the past and that no violations of Federal or State law will result therefrom.

VII.

Defendant denies the allegations of Paragraph 12 and the various sub-sections thereto and, if it be mistaken, then your Defendant says that any damages, if any, that Plaintiffs will suffer are wholly consequential for which they have an adequate remedy at law and they are not entitled to any injunctive relief, either temporary or permanent, and their plea that they will suffer irreparable damages is erroneous as a matter of law.

VIII.

Defendant denies all the allegations contained in Paragraph 13 and the various subsections thereto, and on the contrary would show that the proposed improvement is specifically authorized by the Charter of the City of Dallas and the State statute, and it could not constitute a nuisance that would be subject to abatement by an injunction for any damages that Plaintiffs will suffer, which your Defendant

denies and for which Plaintiffs have an adequate remedy at law. Furthermore, your Defendant calls the Court's attention to the last sentence on page 12 of their First Amended Petition wherein the Plaintiffs admit themselves out of Court wherein they allege that the "situation and conditions as detailed above are necessary consequences of the construction and operation of the proposed runway, however skillful said operation may be," which is tantamount in law to an admission that the property of Plaintiffs is not being taken 'but merely that it will be damaged because they specifically said that it will be a necessary consequence resulting therefrom.'

[fol. 86]

IX.

Defendant denies the allegations of Paragraph 14 and the various subsections thereof, for the reason that it is not within the province of the Plaintiffs to dictate or decide, nor is it a matter for the Court to decide, whether or not the building of the runway is a public necessity or a convenience for the reason that the Governing Body of the City of Dallas is vested with the discretionary power to decide what and where public improvements should be constructed and whether they are or are not necessary.

Furthermore, your Defendant says that it is not a matter for the Plaintiffs to dictate as to whether the City of Dallas will provide airport facilities in the nature of an airport and their pleading constitutes a nothing more than an attempt to have the Court substitute their judgment for that of the City Council when the absolute discretion of such matters is reposed by law in the governing body of the City.

X.

Defendant denies the allegations of Paragraph 15 and says that the action of the City Council in ordering the improvement done, is not arbitrary, capricious and contrary to the public interest. Furthermore the allegation to the effect that the City does not have in its permanent employment a competent engineer is wholly gratuitous and

is a matter of opinion and not to be decided by the Plaintiffs. Furthermore, the allegation with reference to the alleged recommendation of a City Planner Bartholomew is without merit and constitutes nothing more than an opinion of an alleged expert and it is not binding in any way upon the City Council.

Your Defendant further denies that there is anything in the deed from the United States Government, as alleged in Subsections 3 and 4 of said Paragraph 15, which prohibits the City of Dallas from carrying out the proposed improvement. On the other hand, Plaintiffs have alleged in their Amended Petition that the City of Dallas has received approval for the use of the air space in connection with such improvement. In this connection your Defendant [fol. 87] would further show that the instrument (i.e. the deed from the United States Government) of a portion of Love Field has already been received in evidence and which required the City of Dallas to temporarily lease to the United States Government certain of the air facilities installed thereon until such time as the City needed same for the construction for this particular runway. That the City of Dallas, exercising its option, requested the United States Government to vacate the property so that it could utilize same for airport purposes and the building of the runway and the Government has complied with its request and vacated the premises so that the City can proceed with the runway.

Defendant further denies all allegations contained in Subsections 11 and 12 of said paragraph 15 and says that the recommendations, if any, made are wholly immaterial and have no bearing on this lawsuit. Further your Defendant denies and says in response to Subsection 12 of said Paragraph 15 that it owns fee simple title to every inch of airport property save and except for that portion which was conveyed to the City of Dallas by the United States Government of approximately 90 acres which the Government has a right to reclaim during National emergencies only.

XI.

Defendant denies the allegations of Paragraph 16 in toto and says that the revenue bonds which the City of Dallas proposes to issue are not void, illegal or unconstitutional because they have not been voted by the people, for the reason that there is no requirement in the Texas Constitution or any of the State statutes which would require the approval of the voters of a revenue bond issue for airport purposes, and none of the provisions of the Constitution or the Legislative Acts pled therein, have any application whatsoever to the proposed issuance of the revenue bonds.

The Defendant admits that the City Charter of the City of Dallas limits the bonded indebtedness of the City of Dallas to \$135,000,000.00, and says that it has in no way exceeded this authorization, and in that connection the allegation of Subsection 7 of said Paragraph 16, to the effect that the bonded debt of the City of Dallas is presently in excess of \$160,000,000.00 is wholly untrue for the reason that the total bonded indebtedness of the City of Dallas coming within Section 288 of the Charter of the City of Dallas is \$117,410,000.00. The outstanding revenue bonds for water, sanitary sewer and airport purposes are not included herein because they are not within the Charter Limitations and neither are the proposed revenue bonds included since the Charter applies only to the issuance of ad valorem tax bonds.

Defendant further denies that an election is necessary to issue the revenue bonds as pled in Subsection 8 of Paragraph 16, and further denies that the revenue both present and future are inadequate to defray current expenses and amortize the indebtedness of the City of Dallas and on the contrary your Defendant says that the revenues are in excess of the needs of the City and are adequate to finance the principal and maturing interest on the proposed bond issue. If it were not so, the City could not sell them as a matter of law.

Your Defendant denies the allegation contained in Section 10, on page 19 of said Amended Petition and says that the

proposed revenue bonds are not void or unconstitutional without a vote of the people, and likewise denies the legal effect of the allegation of Section 11 and says that the revenue bonds do not come within the constitutional limitations and do not constitute a debt within the meaning of the Constitution.

XII.

For further answer, if such be necessary, your Defendant would show that Love Field was established at its present location as an airport in 1917 during World War I, and was used by the government during the duration of the war for training pilots to fly combat airships and other airborne craft. That in 1922, when the United States government abandoned the same, the City of Dallas leased the premises from the private owners and used it as and established the first municipal airport in the State of Texas, and operated it as such. That in the 1927 election Dallas voted a bond issue under the terms of which Love Field was acquired [fol. 89] from the private owners, which then consisted of 320 acres and at that time the aviation industry began developing and necessitated the enlargement of the field, so that from that time on the field has been enlarged until today it is City owned, and said airport is in excess of 1200 acres of land. That at the time of the acquisition of this airport in 1927 by the City of Dallas, the surrounding area was all open country used for farm lands and was uninhabited. As time went on the City, as aforesaid, proceeded to enlarge the air field by acquisition of private properties and erected in 1940 a terminal for the accommodation of the general public who desired to use air transportation for travel, and for the purposes of hauling United States mail, freight and express. That immediately upon the completion of this air terminal, the United States government took over Love Field for an air base during World War II, and used it and enlarged it by acquiring a considerable amount of private property so as to accommodate war time activities at Love Field. That it was completely under their jurisdiction and control at that time and the United States government did not relinquish the airport until 1946 when

the maintenance and operation of the field, exclusive of the flying, was returned back to the City of Dallas. That under an act of congress, the facilities installed at Love Field and the lands which it acquired for the enlargement of the airport during World War II were turned over to the City of Dallas with a requirement that they be used for airport purposes.

The United States Government further retained in such relinquishment the right to reclaim for war time use should such an emergency arise therefor, and that it holds title to a considerable portion of the property under those conditions. That in the year 1956, the public convenience and necessity demanded the building of a larger terminal at a new location, which it did by building the present terminal building which entailed a sum in excess of \$10,000,000.00. That the terminal was completed in 1958 and Love Field is the focal point in air travel and transportation of goods, wares and merchandise in the whole southwest and accommodates and enplanes over a million passengers annually.

[fol. 90] That the entire traffic operations of the airport are under the exclusive control and jurisdiction of the Federal Aviation Agency in that its agents and employees control and direct the traffic that lands or takes off from Love Field, that they direct the time and place when they should land or from what place they should take off and coordinate the operation of this airport in conformance with others in the area so as to comply with a uniform traffic pattern and to assure safety of other aircraft that may be in the vicinity, passing through, over or by. That the City of Dallas has no control or jurisdiction as to who uses the field in that all licensing of pilots and establishment of routes or carriers is wholly under the jurisdiction of the United States Federal Aviation Agency, and the Civil Aeronautics Board. That as aforesaid, the City of Dallas has no control or jurisdiction or authority to instruct a pilot how to fly, where to fly or when to fly in landing or departing from the field.

That the present terminal was located to utilize the present pattern of runways that were then existing with some extensions, together with those that were on the planning board and in the projected Master Plan for Love Field Airport. That the City of Dallas prepared a master plan for the development of Love Field prior to 1947, when the entire surrounding area still remained open and undeveloped, and the present projected improvement was included in said master plan as early as 1945. That with the increase in demand for services and accommodation of aircraft at Love Field, it has become necessary that the City of Dallas put into execution the planned parallel runway, which is the subject of this suit, and for that purpose it has employed competent consulting engineers, who have collaborated and consulted with the Federal Aviation Agency technical staff. That a plan of improvement was submitted to said agency, who considered the same, and, found it acceptable according to their standards from the standpoint of air space utilization. As is evidenced by two instruments (1) the notice of the proposed designation of an instrument runway at Dallas, Texas, as issued by the Federal Aviation Agency in Ft. Worth, Texas (Being [fol. 91] FW-215-NR), dated and issued February 6, 1961, and (2) a letter dated March 24, 1961 from R. B. Allen, acting district airport engineer of the Federal Aviation Agency, Airports District Office No. 1 at Ft. Worth, Texas, addressed to Mr. George P. Coker, Director of Aviation of Dallas Love Field, a true and correct copy of the two instruments being attached hereto and marked Exhibits "A" and "B", respectively.

XIII.

Defendant specially denies the allegations of Plaintiffs' petition that the proposed runway will not meet the clear zone requirements of the Federal Aviation Agency standards and provision of Technical Standard Order TSO-N18 as amended, and on the contrary will show to the Court that the Technical Standard Order TSO-N18 as amended requires on existing airports the airport owner shall have adequate property interests in runway clear zone areas

constituting the first 2,500 feet of the approach zones as designated under TSO-N18 as amended, with adequate property interests being designated under the CCA policy on runway clear zones as issued on July 1, 1957 as:

"An 'adequate property interest' in a runway clear zone area is an easement (or covenant running with the land) giving the airport owner or operator sufficient control to clear the area of all obstructions (objects insofar as they project above the approach surface established by TSO-N18) and to prevent the creation of future obstructions, together with the right of ingress and egress for such purposes, in order to assure the safe and unrestricted passage of aircraft in and over the area."

The runway clear zones are designated as areas in which the agency that owns or operates the airport should hold an adequate property interest to provide for the unobstructed passage of aircraft, or aircraft landing on the runway or taking off therefrom, and such adequate property interests may be established and acquired by the City through the enactment of a valid zoning ordinance which controls and restricts the heights of buildings in such zone or area. That the City of Dallas enacted such an ordinance under legislative authority granted by the Legislature of the State of Texas, and that the Federal Aviation Agency has accepted the ordinance of the City of Dallas in this [fol. 92] respect as being sufficient to acquire such rights, which ordinance is referred to as the "Airport Zoning Ordinance of the City of Dallas, No. 6463", and officially published by the City of Dallas as an appendix to its 1960 Code of Civil and Criminal Ordinances of the City of Dallas. A true and correct copy of which is attached hereto and marked Exhibit "C". In addition thereto there are attached Exhibits Nos. "D" and "E" which are engineering drawings setting out and showing the runway clear zones as required by the Federal Aviation Agency as they will exist upon the completion of the project. That the proposed improvements are designed and will meet the safety

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requirements for safe operation of planes, both landing and departing from the Love Field.

XIV.

That in addition to the Airport Zoning Ordinance applicable to the Plaintiffs herein, the City of Dallas in 1951, purchased at a consideration of \$50,000.00 a right of way consisting of a little more than 13 acres through a 155 acre tract of land from the owners, who are the predecessors in title of the Plaintiffs James H. Parr, Martin E. Collis, Jr., J. W. Slaughter, Vernon C. Pampell, Paul H. Crawford, E. T. Busch, V. C. Bilbo, W. R. Richardson and Austin Crow, for the purpose of erecting thereon high intensity approach lighting, and that in the purchase of said property as part of the consideration, the City of Dallas paid damages to the remaining tract of land which was subsequently subdivided and land sold to these Plaintiffs for residential purposes. A true and correct copy of the instrument is attached hereto and marked Exhibit "F". The above mentioned Plaintiffs have no cause of action whatsoever or any right to complain because they purchased their property with full knowledge and notice of the covenant releasing the City of Dallas from any damages whatsoever by virtue of the operation of this facility as part of Love Field, and anyone asserting a cause of action by virtue thereof, who subsequently purchased a part of this 155 acre tract of land has no legal right to complain. That the remaining Plaintiffs and their properties are located [fol. 93] more than 3,000 feet from the end of the proposed runway, and is well beyond the limits of the required runway clear zone. That in addition thereto said Plaintiffs purchased their properties with knowledge of the existence of Love Field Airport and of the fact that the same was being and has been expanded, and that it would be necessary to expand the same to take care of increasing traffic demands, and that having done so they are in no legal position to complain of said expansion.

XV.

Your Defendant would further show to the Court that the Plaintiffs bought their respective properties a long

time after the establishment of Love Field as an airport, and subject to its operation as an airport, and that if any cause of action arose in favor of the owners of land in that vicinity, such cause of action arose more than two (2) years prior to the institution of this suit, and is therefore barred by the Two Year Statute of Limitations and for the further reason that their respective properties, which they allege they own, were acquired by and through instruments of conveyance in which said cause of action was not conveyed to them by their predecessors in title and subsequent owners thereof.

XVI.

Your Defendant would further show to the Court that the Plaintiffs bought their respective properties a long time after the establishment of Love Field as an airport, and subject to its operation as an airport, and that if any cause of action arose in favor of the owners of land in that vicinity, such cause of action arose more than four (4) years prior to the institution of this suit, and is therefore barred by the Four Year Statute of Limitations and for the further reason that their respective properties, which they allege they own, were acquired by and through instruments of conveyances in which said cause of action was not conveyed to them by their predecessors in title and subsequent owners thereof.

XVII.

The Plaintiffs are seeking to enjoin the City from awarding [fol. 94] a contract for the improvements contemplated, namely the building of the parallel runway, which according to plans and specifications will be 8800 feet. In this connection your Defendant would show that the City Council did on the 3rd day of April, 1961, receive sealed bids in accordance with the requirements of the Charter of the City of Dallas for the construction of this runway, and that it received nine (9) bids, the lowest of which was \$4,974,382.21. That the lowest and best bid is advantageous to the City and that if the City is enjoined from accepting this bid and awarding the contract therefor, irreparable

damage will be done to the public not only in the way of running the risk that the bid will be withdrawn, but that the public will be damaged by having to wait for the airport improvements, which are needed in order to serve the general public.

XVIII.

That the City of Dallas, as aforesaid, now owns over 1200 acres of land which is a part of Love Field, and that together with the improvements thereon consisting of paved runways, lighting, terminal building and other facilities, it has an investment therein in excess of \$25,000,000.00, and that the tenant certificated airlines have an investment in excess of \$15,000,000.00, which are devoted to the rendering of public services, and that to enjoin the further improvement and use of the airport with the most modern aircraft would destroy the investment not only of the City, but of the public certificated airlines to the great detriment of the public without a corresponding benefit to the individuals of any lawful right, which the City denies, that would be violated.

XIX.

Defendant says further that the allegation, request and alleged violations of the Law and Constitution, as set forth in the relief prayer in Plaintiffs' First Amended Original Petition, as contained on page 2 thereof, are erroneous in point of law, that the relief prayed for should in all things be denied and that the prayer for permanent injunction on the grounds alleged in said Petition should be denied for the reason that this Court is without power or authority [fol. 95] to enjoin a public improvement and that if the Plaintiffs will suffer any damages, collectively or individually, the same are wholly prospective, anticipatory and may or may not materialize in the future. However, if any damages they will suffer, then the same can be compensated in terms of money and can be ascertained from actual facts as they may arise at such time as such damages occur and not before.

WHEREFORE Premises considered your Defendant prays that all of the relief prayed for in Plaintiffs' First Amended Original Petition for a permanent injunction be in all things denied and will every pray.

H. P. Kucera
N. Alex Bickley
Thomas B. Warren

By:
Attorneys for Defendant
CITY OF DALLAS
501 Municipal Building
Dallas 1, Texas

THE STATE OF TEXAS)
COUNTY OF DALLAS)

I, ELGIN E. CRULL, City Manager of the City of Dallas, do solemnly swear on oath that the allegations of act set forth in the foregoing and attached Defendant's Motion to Dismiss and Answer to Plaintiffs' First Amended Original Petition, are true and correct.

ELGIN E. CRULL

SUBSCRIBED AND SWORN TO before me this the day of July, A.D. 1961.

Notary Public in and for
Dallas County, Texas

[fol. 96]

EXHIBIT F TO PETITION FOR WRIT OF MANDAMUS

"Plaintiffs' original complaint" in Case No. 9276 Civil in the United States District Court omitted from the record here as it appears at printed page 255, side folio 468 ante.

[fol. 106] *Duly sworn to by N. Alex Bickley, jurat omitted in printing.*

[File endorsement omitted]

[fol. 107] IN THE SUPREME COURT OF TEXAS

No. A-9340

CITY OF DALLAS, et al., Relators,

vs.

HONORABLE DICK DIXON, CHIEF JUSTICE, et al., Respondents.

RESPONDENTS' ANSWER TO PETITION FOR WRIT OF
MANDAMUS—Filed January 9, 1963

To the Honorable Supreme Court of Texas:

Come now all Respondents named herein (other than the Chief Justice and Associate Justices of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas), and answering Relators' Petition for Writ of Mandamus, respectfully show this Court as follows:

1.

The Petition should be dismissed because of Relators' failure to join the owners and holders of outstanding Dallas Love Field Revenue Bonds, sought to be voided in the pending Federal Court action identified in the Petition herein as Brown et al. vs. the City of Dallas, since their rights will be affected by a decision herein.

2.

Respondents deny that the City of Dallas, had, at any time prior to July 17, 1961, authorized the issuance of Love Field Revenue Bonds, Series 395; and further deny [fol. 108] that the validity of any outstanding issue of bonds of the City of Dallas was the subject of litigation in the State Court suit entitled Atkinson et al. v. City of Dallas.

3.

Respondents allege that the "class" involved in the Atkinson suit consisted of home owners, families and in-

dividuals who live, work, reside and attend schools, churches and other community centers in the area embraced within the approach areas of the proposed new runway at Love Field, and that said suit was brought to enjoin construction of said runway upon allegations of facts existing as of July 17, 1961, the date when summary judgment was entered therein.

4.

Respondents allege that the facts involved in their United States District Court suit were not involved in the Atkinson suit, and that eighty-nine of the Plaintiffs in the Federal action were not parties to the Atkinson suit; Respondents further allege that the only Defendant common to both actions is the City of Dallas, and that the Brown action pending in the United States District Court is not a "class" action.

5.

The Respondents further allege that the Brown case pending in Federal Court involves issues of fact and law which were not involved in the Atkinson suit.

6.

Respondents deny that the allegations of Subparagraph [fol. 109] "2" of Relators' Paragraph are relevant to this proceeding, in that the pleadings upon which the hearing for temporary injunction was heard were abandoned by Respondents and were not involved in the decision as to final judgment.

7.

Respondents deny that the allegations of Relators' Subparagraphs 3, 4, 5, and 6 of Paragraph II are relevant to this proceeding except as to the allegations that Summary Judgment was rendered in favor of the Defendant City in the Atkinson case and affirmed by the Court of Civil Appeals, Writ of Error refused by this Court and Certiorari denied by the United States Supreme Court.

8.

Respondents deny all of the allegations of Subparagraph 7 of Relators' Paragraph II, other than those alleging that the City of Dallas advertised for and received bids for the sale of \$5,000,000 of Airport Revenue Bonds in September of 1962 and that these Respondents are Plaintiffs in the United States District Court action, styled Brown v. City of Dallas, et al., No. 9276 in the Northern District of Texas. The Respondents further specifically deny that the issues raised in the Brown case are the same as those litigated in the Atkinson case.

9.

Respondents admit the allegations of Relators' Paragraph II, Subparagraphs 8, 9, 10 and the first four sentences [fol. 110] of Subparagraph 11, and, except as hereinbefore expressly admitted deny each and every allegation in said Petition contained.

10.

Respondents allege that on October 15, 1962, the Relators joined issue with Respondents in the action pending in the United States District Court for the Northern District of Texas, filing a Motion to Dismiss the Complaint in Civil Action No. 9276, Brown et al. v. City of Dallas et al., and filing an Answer thereto in which they pled the Judgment in the Atkinson case as Res Adjudicata of all issues raised in the Federal suit.

11.

That the action of Relators in submitting to the jurisdiction of the Federal Court in the Brown case demonstrates that they have an adequate remedy at law in their plea of res adjudicata filed therein; Respondents allege that the validity of such plea can only be determined after evidence is introduced in support of the Complaint in the federal cause.

12.

Respondents allege that the Court of Civil Appeals in its opinion filed by the majority of the Court in denying Relators' Application for a Writ of Prohibition made the following finding of fact: "In the instant case the United States District Court has done nothing to repudiate our judgment of affirmance; and we shall not assume that it will do any such thing."

[fol. 111]

13.

Respondents allege that the controversy as to the identity of issues in the Atkinson and Brown cases raises a question of fact which this Court is, without authority to try in this proceeding.

14.

Respondents allege that this Court is without jurisdiction to grant Relators the relief prayed for because such relief would substitute this Court's judgment for that of the Court of Civil Appeals, a judgment which cannot be rendered without the exercise of judicial discretion, and for the further reason that a Writ of Prohibition under Texas law will issue only to restrain the action of an inferior court, and no inferior court is a party to the proceeding for the Writ in the Court of Civil Appeals.

15.

Respondents further allege that the grant of the relief prayed for by the Relators herein would be illegal, unconstitutional and void and in violation of the rights guaranteed to these Respondents by the Constitution and laws of the United States.

16.

Respondents allege that the Judgment of the Court of Civil Appeals, denying Relators application for Writ of Prohibition is wholly in accord with the law of the State of Texas and the Rules of comity followed by both State and Federal Courts.

Wherefore, Respondents pray that Relators Petition [fol. 112] for Writ of Mandamus, heretofore filed herein be in all respects denied and that Respondents have such other and further relief as they may be entitled to in the premises.

Respectfully submitted,

James P. Donovan, Attorney for Respondents, 30½
Highland Park Shopping Village, Dallas 5, Texas.

[fol. 113]

IN THE SUPREME COURT OF TEXAS

No. A-9340

Original Mandamus

City of Dallas et al.

vs.

Honorable Dick Dixon, Chief Justice, et al.

JUDGMENT—March 13, 1963

This cause came on to be heard on petition for writ of mandamus, filed herein on December 6, 1962, and the said petition together with the record and briefs and argument of counsel having been duly considered, because it is the opinion of the Court that the petition should be granted, and a writ of mandamus conditionally issued, it is therefore *adjudged, ordered and decreed* that unless the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas enforces its judgment in the case of George S. Atkinson et al. vs. City of Dallas, No. 16038 on the docket of said Court, by issuing whatever writs are necessary and effective, in accordance with the opinion of this Court herein this day delivered, the Clerk of this Court will issue a peremptory writ of mandamus commanding, compelling and requiring said Court of Civil Appeals so to do.

It is further ordered that respondents, Paul A. Crick, Dr. Hobson Crook, George H. Harmon, James H. Parr, Martin E. Collis, Jr., J. W. Slaughter, James E. Strum, Floyd R. Raupe, George S. Atkinson, Vernon C. Pampeil, Paul H. Crawford, E. T. Busch, V. C. Bilbo, W. H. Richardson, Austin Crow, J. O. Garrett, E. W. Quinton, Dr. Grant Boland, L. E. Dease, H. P. McDonald, M. J. Pellillo, J. D. Lowrie, S. R. Kirby, Charles Williamson, Jean Shaw, W. Claude Jones, James W. Odom, Reveau & Virginia Bassett, Walter Sodeman, Mr. & Mrs. O. L. Whitman, Mr. & Mrs. J. Walter Long, Jr., Mrs. Charles J. Butler, C. H. Asel, Lee R. Slaughter, Frank Grimes, Winston C. Jones, C. O. Crudgington, Daniel C. Brown, J. W. Tomlin, William Darrell Graves, George B. Lotridge, Lloyd S. Carter and Arthur E. Tappan, and their attorney of record, James P. Donovan, jointly and severally, pay all costs in this proceeding in this Court, for which execution may issue.

(Opinion of the Court by Robert W. Calvert, Chief Justice).

[fol. 113a] [File endorsement omitted]

[fol. 114]

IN THE SUPREME COURT OF TEXAS

No. A-9340

CITY OF DALLAS, ET AL, Relators,

VS.

HONORABLE DICK DIXON, CHIEF JUSTICE, ET AL, Respondents.

RELATORS' MOTION PRAYING FOR EARLY DISPOSITION
OF MOTION FOR REHEARING—Filed March 21, 1963

To the Honorable Supreme Court of Texas:

By way of Motion Praying for Early Disposition of Motion for Rehearing, your Relators in the above entitled and numbered cause would show to the Court as follows:

That heretofore on the 13th day of March, 1963, this Honorable Court handed down its opinion conditionally granting a mandamus ordering the Court of Civil Appeals for the Fifth Supreme Judicial District in Dallas to issue all writs necessary to enforce the judgment in the case of *Atkinson v. City of Dallas*. Your Relators are advised that the Judges of said Court of Civil Appeals have not asked, nor will they ask, for a rehearing on said cause, but they stand ready to proceed with the issuance of the writs [fol. 115] necessary for the enforcement of the judgment in the *Atkinson* case. However, the attorney and the plaintiffs in the *Brown* suit have publicly announced through the press their intention to continue the harassment and litigation for another extended period as is evidenced by the newspaper clippings attached hereto. (See Exhibits Nos. 1 and 2). Your Relators anticipate that the Attorney for Respondents will file a Motion for Rehearing in this cause on the last day permissible by law—the avowed purpose of such action is to further delay and prevent the execution of the order of this Court and thus delay the City of Dallas in the construction of the greatly needed public improvement; namely: the construction of the runway at Love Field Airport.

That if the newspaper-releases and television appearance of counsel for the litigants in the *Brown* case are to be given credence—and judging by past conduct, Relators must accept them for their face value—said attorney and his clients will again attempt to delay the execution of the judgment rendered by this Court in this cause by some attempt to appeal or possible petition for Certiorari to the United States Supreme Court and thus cause further harassment, annoyance and delay the City in the utilization of the fruits and rights adjudged to it by the *Atkinson* case. It is inconceivable that the United States Supreme Court would entertain an appeal or petition for Certiorari and grant any relief to them in view of the fact that heretofore the United States Supreme Court had reviewed and considered a petition for Certiorari in the *Atkinson* case but denied it. The threatened appeal by them now con-

stitutes just another overt act on their part to accomplish a purpose that is beyond the pale of the law.

[fol. 116] Relators therefore respectfully present that it is extremely urgent that any Motion for Rehearing that may be filed herein by said attorney and his clients, be promptly disposed of by overruling same and that the Fifth Court of Civil Appeals in Dallas be given evidence of the finality of the judgment of this Court so that it may proceed with the enforcement of the judgment as directed.

Wherefore, Premises Considered, your Relators respectfully pray that any Motion filed herein for Rehearing by the Attorney on behalf of the plaintiffs in the *Brown v. City of Dallas* suit now pending in the United States District Court at Dallas be promptly overruled and that this Honorable Court issue notice to the Fifth Court of Civil Appeals to enforce the judgment in *Atkinson v. City of Dallas*, and that no stay of proceedings be entertained by this Court because there can be no possible merit to any attempt to appeal or any petition to the United States Supreme Court for redress because the matter has already been adjudicated and handled by that Court and the judgment of this Court should be final and promptly enforced.

Respectfully submitted,

H. P. Kucera, N. Alex Bickley, By H. P. Kucera,
Attorneys for Relators, 501 City Hall, Dallas 1,
Texas:

Service (omitted in printing).

[fol. 117]

EXHIBIT No. 1 TO RELATORS' MOTION

Herald 3/13/63

Love Field Litigation
Tossed Out by Court

The Texas Supreme Court called a halt Wednesday to any further litigation by Love Field area residents trying to block extension of the airport's runway facilities.

Mayor Earle Cabell and other city officials hailed the court's unanimous decision as a wonderful step in the further progress of Dallas.

But embittered litigants served notice they are not going to take the decision meekly.

In handing down its decision Wednesday the State Supreme Court said suits filed by the Love Field area residents have reached the point of absurdity.

The court granted the city's request for a writ of mandamus and instructed the Fifth Court of Civil Appeals to issue "whatever writs are necessary to restrain the plaintiffs and their attorneys from further prosecution."

The court declared the right of homeowners in the Love Field area has been settled and realignment of the issues is foreclosed.

"This must be so," the opinion stated. "If it were not so, different groups of Dallas citizens could halt all efforts of the city to improve its airport facilities indefinitely by filing new suits.

"Such an absurdity cannot be tolerated."

James P. Donovan, attorney for the homeowners, said he will make a motion for a rehearing in the State Supreme Court.

"If we're denied this, we will go to the U.S. Supreme Court for a review of the case," he said.

"This ruling has violated accepted rules of comity (procedure). We don't propose to accept denial of our constitutional rights," Mr. Donovan said.

Mr. Donovan said he has 10 days to file a motion for rehearing before the State Supreme Court.

Mayor Cabell said the Supreme Court's decision would enhance Dallas' case for Love Field before the Civil Aeronautics Board, which has ordered a hearing on whether Dallas and Fort Worth should be served by a regional airport.

LESSON TO OTHERS

"I also hope most sincerely that it will be a lesson to other 'professional aginners' that the progress and the welfare of the city of Dallas is paramount and that the best interest of the greatest number of our citizens will prevail," the mayor said.

City Attorney Henry Kucera said the decision could be a landmark in Texas law and declared he was very happy about the court's opinion on the Love Field issue.

The city attorney said, however, that he had not seen a written opinion by the court.

When asked whether the court's ruling cleared away the last legal roadblock holding up construction of the new runway at the airport, Mr. Kucera replied:

"If it isn't the end of the road, I don't know what is."

WAY Now CLEAR

Mr. Kucera said the court's ruling will clear the way for the city to sell bonds for the construction of the new parallel jet runway and other airport improvements, including a second deck for the automobile parking lot.

"The runway could have been in use today," Mr. Kucera said, if it had not been for the long-drawn-out litigation thrown up by the homeowners.

City Manager Elgin Crull said he couldn't say when the bonds to finance the runway will be sold or when work will begin on the project.

"It looks good, though," he said.

Mayor Cabell said in all probability the city will have to readvertise the bonds to finance the Love Field project.

BOND ADS DUE

The city, he said, will probably advertise the entire \$8 million worth of bonds so Dallas can make up for the long delays incurred by the litigation.

The mayor said he hopes an ordinance authorizing the advertising of the bonds can be ready for City Council action next Monday.

In the unanimous opinion written by Chief Justice Robert W. Calvert, the high court commented that the Love Field wrangle had reached the point of "vexatious and harassing litigation."

The high court agreed with the City of Dallas that 122 plaintiffs in Brown et al. vs. City of Dallas, filed in U.S. District Court, were represented by 43 persons who brought a class action to enjoin issuance of \$5 million in Love Field bonds in state district court earlier. The plaintiffs in that suit, Atkinson et al. vs. City of Dallas, were denied the injunction.

ISSUES SETTLED

"All issues which by diligence could have been raised and tried were determined and foreclosed against the plaintiffs in Atkinson et al. vs. the City of Dallas," the Supreme Court stated.

It held the Fifth Court of Civil Appeals has not only a right but a "duty" to stop further litigation on the same issues.

The state appellate court may not invade the jurisdiction of a federal court by ordering dismissal of Brown vs. City, the opinion noted.

The Supreme Court did not say how the suit should be stopped. It told the civil appeals court to issue "whatever writs are necessary" to restrain the plaintiffs and their attorney.

[fol. 118]

EXHIBIT No. 2 to RELATORS' MOTION

Dallas, Texas, Thursday, March 14, 1963

Local News . . . Editorials . . . Classified

DALLAS NEWS

Cabell Sees Runway
Starting in 6 Weeks

By FRANCIS RAFFETTO

The long delayed parallel runway for Dallas Love Field may get under way within six weeks following a favorable Texas Supreme Court decision Wednesday, Mayor Earle Cabell predicted.

The State Supreme Court instructed a group of Dallas residents to stop opposing construction of the \$5,000,000 proposed runway to take the traffic pressure off the existing main runway.

"There is indication in the history of this matter that it has reached the point of vexations and harassing litigation," Chief Justice Robert Calvert said in the high court's opinion.

The City of Dallas interpreted the opinion Wednesday as a clear mandate that construction can begin soon on the runway—even though revenue bonds to finance construction will have to be thrown open for new bids.

But James P. Donovan, representing the Love Field area property owners, promised to stymie actual airport construction for another six to 18 months.

"We will appeal to the Texas Supreme Court for a rehearing and, if denied a rehearing we will go to the United States Supreme Court," promised Donovan, who represented 46 property owners in the first suit and 122 property owners in a second suit to halt the new runway.

The State Supreme Court ordered the Dallas Court of Civil Appeals to stop present suits on the airport matter and to prevent the filing of any more suits.

Continued Donovan: "Or we will continue our suit in the U.S. North District Court asking for an injunction against the Supreme Court of Texas interfering with a federal matter. Then we will appeal to the U.S. Circuit Court in New Orleans and, if no relief is provided, to the U.S. Supreme Court."

City Attorney H. P. Kucera, however, hailed the state high court's ruling Wednesday as a signal victory for the City of Dallas. "I'm happy with the outcome but it's a pity that it took us two years to get this thing done. The runway should have been built and planes should be landing and taking off," said Kucera.

The City Council will be urged Monday to advertise for bids on the entire \$8,000,000 worth of bonds to build the new runway and update Love Field in other aspects, Cabell predicted.

The last revenue bond bids, at a good price for Dallas, were canceled by the litigation apparently ended Wednesday by the State Supreme Court. The bond sale could not be completed without a statement that no litigation was pending to halt any airport improvements.

The question of whether Zachary Construction Co., low bidder for the big airport improvement job, will proceed with the work was unsettled also.

The company won a contract, but this may have to be thrown open for new bids because of the delay in actual construction, it was predicted.

"This is great news," Avery Mays, chairman of the Dallas Chamber of Commerce aviation committee, said Wednesday.

"We hope this stops the seemingly endless legal maneuvers which have blocked the Love Field master plan improvements for so long."

[fol. 119]

[File endorsement omitted]

IN THE SUPREME COURT OF TEXAS
No. A-9340

CITY OF DALLAS ET AL., Relators,

vs.

HONORABLE DICK DIXON, CHIEF JUSTICE, ET AL., Respondents.

RESPONDENTS' MOTION FOR REHEARING—Filed March 28, 1963

To Said Honorable Court:

Come now all Respondents herein, other than the Justices of the Fifth Court of Civil Appeals, and moving for a Rehearing on the Judgment entered by this Court under date of March 13, 1963, respectfully show this Court as follows:

1.

Respondents concede that the opinion rendered correctly states certain fundamental principles of law, viz.:-

- (a) the opinion of the Court of Civil Appeals in denying Relators Application for Writ of Prohibition is not reviewable by appeal or Writ of Error;
- (b) this Court's refusal of Relators' Application for Writ of Error in the Atkinson case did not make the Judgment of the Court of Civil Appeals in that case the Judgment of this Court;
- (c) a Writ of Mandamus will not issue to compel the performance of a discretionary act.

2.

The Action Taken by This Court Is in Excess of Its Statutory and Constitutional Jurisdiction, and the Court [fol. 120] of Civil Appeals for the Fifth Supreme Judicial District of Texas Is Presently Without Jurisdiction Over the Respondents in This Proceeding.

The record before this Court shows that Relators herein applied to the Court of Civil Appeals for the identical relief which they seek to obtain from this Court through Writ of Mandamus.

The Court of Civil Appeals entertained Relators Application for Writ of Mandamus; granted them a full hearing, entered Judgment in favor of Respondents, gave the Relators oral argument on their Motion for Rehearing and overruled said Motion. That Judgment, as stated by this Court and admitted by Relators was a final judgment, not subject to review by this Court. Therefore the proceeding before the Court of Civil Appeals was concluded by the Judgment rendered and the Respondents herein are no longer subject to that Court's jurisdiction.

The Court of Civil Appeals in denying Relators' Application, in the exercise of its judicial discretion in the opinion of the majority, stated:

"The pendency of Action No. 9276 in the United States District Court does not invade our exclusive jurisdiction, though the issues in the suit may be the same as the issues decided in our judgment of affirmance. Ours is not the only Court which has jurisdiction to enforce a plea of res judicata in support of our judgment of affirmance of December 15, 1961. That defense may be and has been pled by the City in Action 9276 in the United States District Court, and that Court has jurisdiction to hear and give effect to the plea."

[fol. 121] "Petitioners contend in effect our jurisdiction is invaded because Respondents have filed a suit in another Court in which Respondents try to ignore the finality of our judgment. And Petitioners further contend that the only way our jurisdiction can be protected and respected is by the issuance of a Writ of Prohibition restraining the

litigants from further prosecuting their suit in the other Court where it is now pending. We do not agree to such a contention. To agree would be equivalent to hold that the conclusiveness of a judgment could never be determined except by the Court that rendered it."

This holding of the Court of Civil Appeals was not discussed in this Court's opinion. Obviously it represents a finding of fact by that Court, which indirectly this Court seeks to reverse by its opinion. No contention is made by Relators that there was no evidence or affidavits before the lower Court to sustain this finding.

On application for Writ of Error Rule 476 provides that trials in the Supreme Court shall be only upon the questions of law raised by assignment of error or by certification. Moreover, without variation the Judges of this Court, throughout the history of Texas Jurisprudence have held that where a question of fact is involved a writ of mandamus will not issue.

Respondents submit that the Judgment is in error because it orders a Court to take action against citizens not involved in a proceeding pending before it; it imposes upon such court its discretion as to the actual judicial decision to be made; and it substitutes this Court's finding of fact as to interference for that made by the Court [fol. 122] of Civil Appeals.

A careful reading of the Constitutional and Statutory provisions relied upon by this Court in its opinion fails to demonstrate the recognition of any supervisory authority in this Court over matters in which the lower Courts have been granted exclusive and final jurisdiction. To carry the theory of the decision filed herein to its logical result, any party to a divorce action, dissatisfied with the result, would be permitted to seek relief against the lower courts through mandamus. This Court's past decisions indicate that such action will not be permitted.

Respondents submit, that the decision in this case demonstrates an unlawful usurpation of legislative power, in violation of the Constitution, through this Court's attempted expansion of its jurisdiction.

This position is further supported by this Court's instruction to the Court of Civil Appeals that "The Court of Civil

Appeals may not, however, order or direct dismissal of Brown v. City of Dallas. A suit cannot be dismissed from the docket of a court without an order of the court; and any writ directing dismissal of Brown v. City of Dallas would invade the jurisdiction of the United States District Court to control its own docket."

The quoted statement indicates this Court's conclusion that the Court of Civil Appeals has no conception of the fundamental principles of jurisprudence; it is almost insulting. Clearly it demonstrates this Court's mistaken assumption that it can tell any court in Texas how to decide the cases before it. Such authority does not exist, [fol. 123] either under the Texas Constitution or Texas Statutes.

The Court's opinion wholly fails to take into consideration the rule of comity between the federal and state courts. This rule has heretofore been applied in the pending litigation, and we believe correctly so.

It is further noted that the decision rendered herein instructs the Court of Civil Appeals to do indirectly that which it cannot do directly; it is ordered to ~~confine~~ the dismissal of a suit through injunction against prosecution, which in effect would compel the District suit to enter an involuntary dismissal against the Respondents. This again is contrary to the universally recognized judicial maxim that the law will not permit that to be done indirectly, which cannot be done directly.

3.

Issuance of Mandamus on the theory that Relators have no adequate remedy at law, is not sustained by the Record before the Court.

Since the initiation of the Atkinson suit the City officials have widely proclaimed that they are being harassed by a group of dissident citizens. Respondents submit that if there has been any harassment, it has arisen from the Relators' unwillingness to make use of the legal remedies available.

For example, on October 13, 1962, the Relators filed a Motion in the Brown case, pending in United States Dis-

trict Court, praying dismissal of that suit on the ground that, among other claims, the issues raised had been adjudicated in the Atkinson case. Instead of pressing for a [fol. 124] decision on this Motion, Relators have elected to avoid such a decision by seeking relief in the State Courts through some type, any type, of injunction. The Relators, as this Court knows, have available to them in Federal Court the right to make a Motion for Summary Judgment. We assume that if the Relators had a good defense to Respondents' Federal action, they would have submitted it by such a Motion. Had they done so and been successful this litigation, even with appeals would have been nearing a termination.

Relators submit that the reason for granting a mandamus lies in harassment by successive suits. Respondents are fully aware of the import of a favorable decision for Respondents in the Federal suit, and, as this Court knows, of the resulting impact on the Texas marketing of airport revenue bonds. However, the rights of Respondents are equal to, if not superior to those of any bondholders whose bonds might be declared void. The harassment herein, if any, has been of those citizens who have sought to enforce their rights under law through the Courts. The Relators have set up every road block possible to prevent Respondents' obtaining a judicial determination of those rights.

This problem would not be before this Court if the citizens of Dallas had been granted their right to the election provided for by statute. This Court's refusal of Respondents' application for writ of error in the Atkinson case, n. r. e., has left the validity of that right in question. An election would settle the problem, but we assume that it has not been held, for fear that the voters would not approve the expenditures desired by the City officials. [fol. 125]

Respondents submit that if the City officials are disturbed by prolonged litigation, the fault lies with the City representatives who have successfully pursued a diversionary action calculated to prevent a decision on the true question involved, the people's right to an election and protection of their individual rights.

**The Class Rule of Hovey v. Shepherd is
Inapplicable to the Case at Bar**

The Court in holding that the Plaintiffs in the Brown action are precluded by the Judgment in the Atkinson case relied upon Hovey v. Shepherd. That case stated the rule as follows: " * * * if the matter adjudicated affected the interest of the public as distinguished from the private interest of the citizens of the city, although not parties to the suit, all citizens are concluded thereby." In the Atkinson case, the public interest was not sought to be protected by the Plaintiffs. All the Plaintiffs sought was the protection of the individual rights of the persons who would be affected by the construction of the proposed runway. It did not involve the public interest in any way. The Shepherd case involved construction of the Charter of a railroad company, a public utility, with relation to location of its facilities as between two municipalities. The decision also involved a judgment of the Supreme Court as distinguished from this case which involves a final judgment of the Court of Civil Appeals.

[fol. 126]

**The Issues in the Brown and Atkinson Cases Were Not,
Nor Are They Now the Same.**

The Court in its opinion stated that the issues in the Atkinson case and in the Brown case are the same. This statement cannot be supported in the record. For one example of the fallacy of this Court's conclusion, the Court's attention is directed to the fact that the injunction sought in the Atkinson case was against *future* action. The Court of Civil Appeals recognized that fact in its original decision by holding that a citizen did not have legal capacity to enjoin a prospective issue of bonds, citing cases which held that the citizen's remedy was to seek injunction against payment of any bonds believed to be void. In the Brown case, Plaintiffs seek, not to enjoin the issuance of bonds, but to enjoin the payment of bonds issued in violation of statute and therefore void. The Atkinson case

was predicated upon facts existing as of July 1961 and actionable as between the parties thereto. Since no holder of outstanding revenue bonds was a party to that suit, the issues raised in the Brown case could not have been litigated. The Court will also find that the record demonstrates that the prayers in each of the suits involved are distinctly different. Moreover, the federal suit is predicated upon rights guaranteed under the Civil rights laws of the United States and other Federal Statutes, none of which were involved in the Atkinson case. To bolster its case, this Court has made a finding of fact as to Attorney General action, which finding is predicated upon an assumption of a court as to what the policy of the Attorney General was some years ago. There is nothing in the pleadings to substantiate the finding made; a brief or an opinion of a court will not stand as a basis for a finding of fact.

6.

Technical Rules of law may not be disregarded by this Court. This Court wrote that technically speaking, "writs of prohibition issue to courts and not litigants." The Court then disposed of Respondents' argument as to Relators' right to a writ of prohibition by saying that "identity of the writ sought is of no significance." While such a modification of a Plaintiffs' pleading is not in accord with accepted practice that one can only obtain the relief prayed for, it would still not be available to grant the relief given herein to Relators. Respondents, in the Court of Civil Appeals and before this Court were never served with a pleading praying for an injunction; no facts were alleged in either Court which would establish either irreparable damage to Relators through prosecution of the Federal suit by Respondents, nor the lack of an adequate remedy at law. After close of a hearing it would appear illegal to substitute a *presumed* pleading and a *presumed* prayer for relief, against which respondents had no opportunity to interpose or reason to interpose defenses.

**The Decision Rendered by This Court Is in Violation of
Respondents Rights Guaranteed by the United States
Constitution and Statutes.**

The Congress of the United States has under the Constitution [fol 128] of the United States enacted certain statutes for the protection of United States citizens; further, that same Congress has under that Constitution created a system of United States Courts as a forum to insure enforcement of the rights granted. The United States Courts are manned by competent Judges to interpret the laws involving Federal questions. The Constitution of the United States and of Texas grant to each Texan the right of due process and equal protection of the laws. The decision of this Court as it now stands, breaks all precedent by holding that although a State Court cannot enjoin or prohibit action by a United States Court in a matter within its jurisdiction, it can deprive a citizen of his rights under the Federal Constitution and laws, by the simple expedient of putting him in jail if he persists in a legal manner to assert his rights. Such action is clearly unconstitutional, and void.

Respondents respectfully pray that they be granted a rehearing on this Court's decision entered herein on March 13, 1963, that they be granted oral argument at such hearing and that upon the conclusion thereof said decision be reversed and Relators' prayer for relief denied.

Respectfully submitted,

James P. Donovan, Attorney for named Respondents, 30½ Highland Park Shopping Village, Dallas 5, Texas.

[fol. 129]

[File endorsement omitted]

IN THE SUPREME COURT OF TEXAS

No. A-9340

CITY OF DALLAS, et al., Relators,

vs.

HONORABLE DICK DIXON, Chief Justice, et al., Respondents.

RELATORS' REPLY TO RESPONDENTS' MOTION FOR
REHEARING—Filed April 1, 1963

To the Honorable Supreme Court of Texas:

Come Now the Relators in the above entitled and numbered cause and by way of Reply to the Motion for Rehearing by James P. Donovan et al. filed herein on March 28, 1963, would show to the Court as follows:

1.

True to form, Respondents have waited to the last minute to file a Motion for Rehearing in this case which is in consonance with Respondent Donovan's announced policy to cause delay in the enforcement of the judgment rendered in this case.

[fol. 130] In essence the Motion for Rehearing assigns as errors the following points:

(1) That the Court in granting the mandamus did so in excess of its statutory and constitutional jurisdiction;

(2) That the issuance of the mandamus on the theory that Relators have no adequate remedy at law, is not sustained by the record before the Court;

(3) That the class suit rule announced in *Hovey v. Shepherd* is inapplicable to this case;

(4) That the issues in the *Brown* suit pending in the Federal Court are not the same as those in the *Atkinson* case;

(5) That the Relators prayed for the wrong relief and that the Court's holding to the effect that this is immaterial, was erroneous;

(6) That the decision rendered by this Court violates the rights of Respondents guaranteed to them by the United States Constitution and Statutes.

Relators submit that there is no merit whatsoever for the Motion for Rehearing. There are only two basic issues in the case; namely:

(1) Does the City of Dallas have the right to construct a parallel runway at Love Field on its own property for the purpose of improving its airport facilities without in advance having to pay consequential damages to Respondents (if any be due them) whose property, under the record, is 2,000 feet, or more, removed from the proposed improvement?

[fol. 131] The Court of Civil Appeals, in the case of *Atkinson v. City of Dallas*, held that the City does have such right and this Court refused a writ of error (no reversible error) and the United States Supreme Court denied a petition for writ of certiorari.

(2) Is the proposed revenue bond issue, with which to finance this improvement, under authority of Article 1269j-5, V.A.C.S. valid without the approval of the qualified voters of the City?

The Court of Civil Appeals and this Court have on numerous occasions held such to be legal.

On the matter of the class suit rule where the *Hovey v. Shepherd* case is questioned as being applicable, Relators respectfully differ with the Respondents. We believe that such matter, so far as Texas jurisprudence is concerned, is settled beyond cavil by that case and the case of *Cochran County v. Boyd*, 26 S.W. 2d 364.

Furthermore, the language used by Respondents in the last paragraph on page 4 and the argument under the 7th Assignment of Error on pages 9 and 10, are almost contemptuous.

Relators have heretofore filed a motion in this Court in anticipation of this Motion for Rehearing and prayed for an early disposition of this Motion for Rehearing. We now renew this motion and respectfully pray that this Honorable Court overrule this Motion for Rehearing at an early date and advise the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas that it is at liberty to proceed with the enforcement of the judgment [fol. 132] in the *Atkinson v. City of Dallas* case, by such writs as the Court may deem necessary and proper.

Furthermore, Relators respectfully pray that the enforcement of the judgment rendered by this Court be not stayed by any attempt to again seek redress in the United States Supreme Court because that Court has already denied the petition for writ of certiorari in the *Atkinson v. City of Dallas* case, and no legal reason or grounds exist for any further delay in the enforcement of this just-
ment, and will ever pray.

Respectfully submitted,

H. P. Kucera, N. Alex Bickley, By H. P. Kucera,
Attorneys for Relators, 501 City Hall, Dallas 1,
Texas.

Service (omitted in printing).

[fol. 133]

IN THE SUPREME COURT OF TEXAS

No. A-9340

Original Mandamus

City of Dallas et al.

vs.

Honorable Dick Dixon, Chief Justice, et al.

ORDER DENYING MOTION FOR REHEARING—April 10, 1963

Motion of respondents, except the Justices of the Court of Civil Appeals, for rehearing, filed in the above numbered and entitled cause on March 28, 1963, having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

[fol. 134]

IN THE COURT OF CIVIL APPEALS FOR THE
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

No. 16,193

CITY OF DALLAS, et al, Petitioners,

vs.

DANIEL C. BROWN, et al, Respondents.

WRIT OF PROHIBITION AND ANCILLARY ORDERS—
April 16, 1963

On this the 16th day of April, 1963, came on to be considered the matter of the issuance of a writ of prohibition and ancillary orders in compliance with the judgment and orders of the Supreme Court of Texas handed down March 13, 1963, in Cause No. A-9340, City of Dallas et al vs.

Honorable Dick Dixon, Chief Justice, et al, in which cause a motion for rehearing was overruled by the Supreme Court of Texas on April 10, 1963.

In this cause, the City of Dallas, together with certain of its officials and other interested parties, as Petitioners, seeks a writ of prohibition and ancillary orders against Daniel C. Brown, Mary Brown, R. L. Pitt, Pauline Pitt, Harvey Bell, Austin Crow, Alberta R. Crow, Frank Grimes, Lena Mae Grimes, Winton R. Dukelow, Patricia P. Dukelow, W. H. Richardson, Faye Richardson, B. D. Siegel, Marion Lee Siegel, Charles Williamson, Jerry Williamson, Paul A. Crick, Anne K. Crick, E. W. Quinton, Geneva Quinton, W. C. Jones, U. J. Boland, Dorothy Boland, Arthur G. Rudkin, Helen Rudkin, James E. Strum, Linnis Strum, Paul M. Crawford, Nora Crawford, Martin E. Collis, Jr., Norma June Collis, Arthur E. Tappan, Bettie Tappan, E. Gardner Clapp, Stella Clapp, George Atkinson, Jack H. Broom, Jane Broom, George B. Lotridge, Browning Lotridge, J. W. Tomlin, Charline Tomlin, H. P. McDonald, Lometta McDonald, J. D. Lowrie, Jr., Lillian Lowrie, Anna Marie Pylant, Calvin Pylant, Lewis A. Park, Lola E. Park, S. A. Myrick, Dorothy Lusk Myrick, Robert L. Brackett, [fol. 135] William C. Isom, Juanita Isom, E. T. Cramer, Walter Sodeman, Lee R. Slaughter, Emily F. Slaughter, J. H. Parr, Joan S. Parr, J. W. Slaughter, Jr., Christine C. Slaughter, R. F. Slaughter, James W. Odom, Helen Odom, S. R. Kirby, M. J. Pellillo, Zelma Pellillo, Jean Shaw, C. D. Crudgington, Harriet G. Crudgington, Dr. Hobson Crook, Russell Moore Crook, J. O. Garrett, Amy Rose Garrett, Paul Short, Besa Fairtrace Short, R. C. Logan, Marion Logan, Dee Powell, Jessie Powell, Arthur B. MacKinstry, III, June C. MacKinstry, James H. Murray, E. T. Busch, Louise Busch, P. D. King, Nancy King, M. E. Worrell, Jr., Lucille Worrell, Dr. Grant Boland, J. F. McClain, Charlene McClain, Fred M. Gore, Mary R. Gore, L. A. Danek, Lawrence R. Schmidt, Wayne Hood, Geneva Hood, J. M. Berry, Ethel Berry, C. J. Bitter, Patricia Bitter, Janet McCluer, Forrest McKee, Dorothy McKee, James O. Boyd, Robie Boyd, Alberta M. Turrill, Arvil Jarman, Mary Jarman, William S. Holden, Virginia Holden, Harvey Waldman, Evelyn Waldeman, J. W. McCulley, J. H. Hud-

bleston, Richard Zacha, individually and as taxpayers and landowners in the City of Dallas and as representatives of a class of taxpayers and residents and landowners in the vicinity of Love Field; and James P. Donovan, individually and as the attorney for the other parties, all as Respondents, which said cause was heard by this Court and the decision therein was handed down on the 24th day of October 1962.

And this Court being of the opinion that in order to comply with the orders and instructions of the Supreme Court of Texas, it is necessary to set aside and hold for naught our judgment heretofore entered in this cause on the 24th day of October 1962, in which cause motion for rehearing was overruled on November 23, 1962;

It is therefore Ordered, Adjudged and Decreed that the judgment heretofore rendered in this cause by this Court on October 24, 1962, is set aside and held for naught, and said cause of action is restored to the docket of pending causes to await further orders of court.

[fol. 136] It is further Ordered, Adjudged and Decreed that the said James P. Donovan, individually and as attorney, and any other agents, attorneys or representatives, of the Respondents herein, and the Respondents each and every one, individually and as a class of taxpayers and residents and landowners in the vicinity of Love Field, together with all other persons similarly situated, are hereby prohibited from prosecuting, urging or in any manner seeking to litigate, as attorney and/or plaintiffs, Civil Case No. 9276 styled Brown et al vs. City of Dallas et al, now pending in the United States District Court for the Northern District of Texas, Dallas Division, and they and each of them, individually and as a class are further prohibited and enjoined from filing or instituting any litigation, lawsuits or other actions seeking to contest the right of the City of Dallas to proceed with the construction of the parallel runway as presently proposed at Love Field situated within the City of Dallas, Texas, or from instituting and prosecuting any further litigation, lawsuits or actions in any court, the purpose of which is to contest the validity of the airport revenue bonds heretofore issued under authority of Article 1269j, V.A.C.S., or that might be issued

under said Article for the construction of the Love Field runway and the ancillary improvements in connection therewith, or from in any manner interfering with, or casting any cloud upon, or slandering the title of, or interfering with the delivery of, the proposed bonds, by the City of Dallas, any of its agents or representatives or others seeking to assist them in the sale and delivery of the same.

All of the Respondents herein, individually and as a class, and others in the same class, are further prohibited and enjoined from in any manner interfering with the enforcement and execution of the judgment in the case of *Atkinson et al vs. City of Dallas*, reported at 353 S.W. 2d 275.

By issuance of this Writ, this Court does hereby give notice to all of the parties herein, their agents, attorneys and representatives, individually and as a class, and to any and all other persons of the same class or attempting [fol. 137] to represent these individuals or others in the same class, that it will take such action as may be necessary to prohibit and enjoin the filing of any other vexatious or harassing litigation seeking to relitigate any of the issues raised, or that could have been raised, in this cause or in the case of *Atkinson et al vs. City of Dallas*, supra, or from in any manner interfering with this writ of prohibition and the full enforcement of the fruits of the judgment of the *Atkinson et al vs. City of Dallas* case, under pain of contempt of this Court.

It Is Further Ordered that the Respondents herein and as herein named and their attorney of record, James P. Donovan, jointly and severally, pay all costs in this proceeding, together with all costs in the original action herein styled City of Dallas, et al vs. Brown, et al, for all of which execution may issue.

Therefore, We command you to observe the Order of our said Court of Civil Appeals in this behalf and in all things to have it duly recognized, obeyed and executed and notice is hereby given to you by and through your attorney, James P. Donovan, on whom a copy of this Order has been served in person, and a copy of the same shall be mailed to each Respondent by the Clerk of this Court.

Witness the Honorable Dick Dixon, Chief Justice of our said Court of Civil Appeals with the Seal hereunto set at the City of Dallas, Texas, this the 16th day of April, A.D. 1963.

Honorable Dick Dixon, Chief Justice, Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas.

[fol. 138] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 139]

IN THE COURT OF CIVIL APPEALS FOR THE
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

No. 16193

CITY OF DALLAS, a municipal corporation, et al, Petitioner,

vs.

DANIEL C. BROWN, et al, Respondents.

MOTION FOR CONTEMPT—Filed May 7, 1963

To the Honorable Court of Civil Appeals:

Comes Now the City of Dallas, a municipal corporation, one of the Petitioners in the above entitled and numbered cause, and moves the Court to hold James P. Donovan, Daniel C. Brown, Mary Brown, R. L. Pitt, Pauline Pitt, Harvey Bell, Austin Crow, Alberta R. Crow, Frank Grimes, Lena Mae Grimes, Winton R. Dukelow, Patricia P. Dukelow, W. H. Richardson, B. D. Siegel, Marion Lee Siegel, Paul A. Crick, Anne K. Crick, W. C. Jones, U. J. Boland, James E. Strum, Linnis Strum, Paul M. Crawford, Nora Crawford, Martin E. Collis, Jr., Norma June Collis, George Atkinson, J. W. Tomlin, Charline Tomlin, H. P. McDonald, William C. Isom, Walter Sodeman, Lee R. Slaughter, Emily F. Slaughter, J. H. Parr, Joan S. Parr, J. W. Slaughter, Jr., Christine C. Slaughter, R. F. Slaughter, James W.

Odom, Helen Odom, M. J. Pellillo, Zelma Pellillo, Dr. Hobson Crook, Russell Moore Crook, R. C. Logan, Marion Logan, Dee Powell, Jessie Powell, P. D. King, Nancy King, M. E. Worrell, Jr., Lucille Worrell, Fred M. Gore, L. A. Danek, Wayne Hood, Geneva Hood, Janet McCluer, Alberta M. Turrill, Harvey Waldman, Evelyn Waldman, in contempt of this Court for violation of the Writ of Prohibition and Ancillary Orders issued by this Court on the 16th day of April, 1963, and as grounds for this Motion, would show the Court as follows:

I.

That this honorable court in cause No. 16038, styled George S. Atkinson et al vs. City of Dallas, by decision dated December 15, 1961 and reported in 353 SW 2d 275, affirmed the Judgment of the District Court of Dallas [fol. 140] County, and upheld the right and authority of the City of Dallas to build a parallel runway at Love Field and to finance the same through the issuance of Revenue Bonds under the authority of Article 1269J-5 of Vernon's Texas Civil Statutes. A Motion for Rehearing was overruled and thereafter an Application for Writ of Error was refused, N.R.E. by the Supreme Court of Texas and Petitioners were denied the right to file a Motion for Rehearing. Thereafter, on or about the 11th day of June, 1962, Appellants in that case, as Petitioners, filed a Petition for a Writ of Certiorari in the Supreme Court of the United States, which Petition was denied and a Motion for Rehearing was overruled. Thereafter, on the 24th day of September, 1962, the said James P. Donovan as attorney, filed suit, Civil Cause No. 9276, styled Daniel C. Brown, et al vs. City of Dallas, et al, in the United States District Court for the Northern District of Texas, Dallas Division, in which said suit, there were the same Plaintiffs that litigated the issues in the Atkinson case and in addition thereto, other parties similarly situated, joined as Plaintiffs. Thereafter, the City of Dallas, on the 2nd day of October, 1962, filed its Original Petition in this Court in which it sought a Writ of Prohibition and such Ancillary Orders as may be necessary to prohibit the said James P. Donovan and the Plaintiffs in the Brown suit from so litigating the

matter on the ground that the judgment in the Atkinson case was final as to all matters that were litigated or which should have been litigated in that suit; that they were res adjudicata as to the litigation of the same in the Brown suit, and any such relitigation was an interference with the judgment of this Court and merely sought to prevent the City of Dallas from reaping the fruits and benefits of the Atkinson judgment. After notice and hearing, this Honorable Court refused to grant the relief prayed for by the City of Dallas. On the 8th day of December, 1962, the City of Dallas, as Petitioner, filed its Original Application for a Mandamus in the Supreme Court of the State of Texas, in which it asked that the Supreme Court order and direct the Court of Civil Appeals to grant the relief prayed for and which relief this Court of Civil Appeals had denied the Plaintiff in Cause No. 16193, styled City of Dallas, et al vs. Daniel C. Brown, et al, the opinion of which is reported in 362 S.W. 2d 372.

II.

That the Supreme Court of Texas, in Cause No. A-9340, [fol. 141] styled City of Dallas et al, relators, versus Honorable Dick Dixon, Chief Justice, et al, respondents, did by opinion dated the 15th day of March, 1963, at 365 SW 2d 919 issue its Order, styled An Original Mandamus. Subsequent to the issuance of that Writ, the Motion for rehearing was overruled and notice given to this Court, together with certified copies of the Opinion and Judgment of the Court.

III.

Pursuant to said Order, this Court did, on the 16th day of April, 1963, grant its Writ of Prohibition and Ancillary Orders, directed against the following respondents herein, specifically to wit: James P. Donovan, Daniel C. Brown, Mary Brown, R. L. Pitt, Pauline Pitt, Harvey Bell, Austin Crow, Alberta R. Crow, Frank Grimes, Lena Mae Grimes, Winton R. Dukelow, Patricia P. Dukelow, W. H. Richardson, B. D. Siegel, Marion Lee Siegel, Paul A. Crick, Anne K. Crick, W. C. Jones, U. J. Boland, James E. Srum,

Linnis Strum, Paul M. Crawford, Nora Crawford, Martin E. Collis, Jr., Norma June Collis, George Atkinson, J. W. Tomlin, Charline Tomlin, H. P. McDonald, William C. Isom, Walter Sodeman, Lee R. Slaughter, Emily F. Slaughter, J. H. Parr, Joan S. Parr, J. W. Slaughter, Jr., Christine C. Slaughter, R. F. Slaughter, James W. Odom, Helen Odom, M. J. Pellillo, Zelma Pellillo, Dr. Hobson Crook, Russell Moore Crook, R. C. Logan, Marion Logan, Dee Powell, Jessie Powell, P. D. King, Nancy King, M. E. Worsell, Jr., Lucille Worrell, Fred M. Gore, L. A. Danek, Wayne Hood, Geneva Hood, Janet McCluer, Alberta M. Turrill, Harvey Waldman, Evelyn Waldman. A copy of said order was mailed to each of these respondents. Said Order further provided that said parties and all of them, "together with all other persons similarly situated, are hereby prohibited from prosecuting, urging or in any manner seeking to litigate, as attorney and/or plaintiffs, Civil Case No. 9276 styled Brown et al vs. City of Dallas et al, now pending in the United States District Court for the Northern District of Texas, Dallas Division, and they and each of them, individually and as a class, are further prohibited and enjoined from filing or instituting any litigation, lawsuits or other actions, seeking to contest the right of the City of Dallas to proceed with the construction of the parallel runway as presently proposed at Love Field situated within the City of Dallas, Texas, or from instituting and prosecuting any further litigation, lawsuits or actions in any court, the purpose of which is to contest the validity of the airport revenue bonds heretofore issued under authority of Article 1269J, V.A.C.S., or that might be issued under said Article for the construction of the Love Field runway and the [fol. 142] ancillary improvements in connection therewith, or from, in any manner interfering with, or casting any cloud upon, or slandering the title of, or interfering with the delivery of, the proposed bonds by the City of Dallas, any of its agents or representatives or others seeking to assist them in the sale and delivery of the same."

IV.

The City of Dallas filed a Motion to Dismiss the Brown suit. It was set with notice to James P. Donovan that it would be heard on the 25th day of April, 1963, at 11:00

a.m. Prior thereto, counsel for the Defendants met with Mr. Donovan as counsel for the Plaintiffs in the chambers of Judge Sarah T. Hughes at which time Mr. Donovan, on behalf of his clients, asked that the hearing be reset for a different date. The Court then set it for the 2nd day of May, 1963, at 2:00 p.m. At the time of said hearing, James P. Donovan appeared as attorney and filed a Motion to Drop Certain Parties Plaintiff and to Add New Parties Plaintiff, which was filed in said cause on the 2nd day of May, 1963, a copy of which is attached hereto as Exhibit "A" and made a part hereof for all purposes. The Court then granted the Motion to Drop Certain Parties Plaintiff and they were dropped from the lawsuit. On the Motion to Permit other Persons to intervene in said lawsuit as Plaintiffs, the Court allowed the intervention only after it had satisfied itself and the attorney, James P. Donovan, had stipulated in the record that they were aware of the Writ of Prohibition issued by this Court and that they had been warned that to actively prosecute said suit might be a contempt of this Court and the orders issued by it. The attorney stated that after this matter had been brought to their attention, the parties had specifically requested in writing that they be made Plaintiffs in this suit, those persons being the following, to-wit: William G. Byars, Mrs. L. A. Danek, G. C. Karr, Audrey M. Karr, Russell G. Rogers, Caroline Rogers, Mrs. Arlene E. Davis, Donald S. Reckrey. This is all more clearly set out in Exhibit "A" entitled "Motion to Drop Certain Parties Plaintiff and to Add New Parties Plaintiff" which was filed in said cause on the 2nd day of May 1963, a copy of which is attached hereto as Exhibit "A" and made a part hereof for all purposes.

[fol. 143]

V.

In spite of the Writ of Prohibition issued from this Court, the attorney James P. Donovan, representing the parties as hereinabove set out, filed in the United States District Court for the Northern District of Texas, Dallas Division, an instrument styled "Plaintiffs Answer to Defendant's Motion and Supplemental Motion to Dismiss"; this was filed on the 2nd day of May, 1963, and is attached

hereto as Exhibit "B" and made a part hereof. Subsequent to the filing of these instruments and the admission of new parties, the Court proceeded to hear the Supplemental Motion of the City of Dallas to Dismiss Cause Number 9276 pending in the United States District Court for the Northern District of Texas, Dallas Division, styled Daniel C. Brown, et al, Plaintiffs vs. City of Dallas, et al, Defendants. The attorney James P. Donovan actively and vigorously opposed the Motion to Dismiss and presented arguments to the Court to the effect that he and his clients had not had their day in Court and that their briefs and motions to the Supreme Court of the State of Texas had not been given complete and unbiased consideration and continued to resist and to argue said cause, the same as though no orders were pending from this Court. The record of the argument and the proceedings in that Court are attached hereto, marked Exhibit "C" and made a part hereof for all purposes.

VI.

In addition to the foregoing, after the Court issued its Writ of Prohibition to Daniel C. Brown in the Federal Court and said Writ, having been served upon them, James P. Donovan proceeded on behalf of himself and the same Plaintiffs to file cause Number CA-3-63-120 Civil against the Chief Justice and the members of the Supreme Court and the Chief Justice and the Associate Justices of this Court in which he prayed the Federal District Court to grant an injunction against them from enforcing the Writ of Prohibition as directed by the Supreme Court, which said cause is still pending on the docket of the Federal District Court. The contents of this suit are well known to this Court because they are parties thereto and were served citations and said cause is set for a hearing in the Federal District Court on the 9th day of May, 1963. In addition to the hereinabove named parties of which the City of Dallas complains, they also complain of the following parties who were original plaintiffs in the Brown suit [fol. 144] and were dropped therefrom, but who are now Plaintiffs prosecuting the suit against the Supreme Court

and this Court, to-wit: Faye Richardson, Charles Williamson, Jerry Williamson, E. W. Quinton, Geneva Quinton, Dorothy Boland, Arthur G. Rudkin, Helen Rudkin, Arthur E. Tappan, Bettie Tappan, E. Gardner Clapp, Stella Clapp, Jack H. Broom, Jane Broom, George B. Lotridge, Browning Lotridge, Lometta McDonald, J. D. Lowrie, Jr., Lillian Lowrie, Anna Marie Pyland, Calvin Pylant, Lewis A. Park, Lola E. Park, S. A. Myrick, Dorothy Lusk Myrick, Robert L. Brackett, Juanity Isom, E. T. Cramer, S. R. Kirby, Jean Shaw, C. B. Crudgington, Harriet G. Crudgington, J. O. Garrett, Amy Ross Garrett, Paul Short, Besa Fairtrace Short, Arthur B. MacKinstry, III, June C. MacKinstry, Jaines H. Murray, E. T. Busch, Louise Busch, Dr. Grant Boland, J. F. McClain, Charlene McClain, Mary R. Gore, Lawrence R. Schmidt, J. M. Berry, Ethel Berry, C. J. Bitter, Patricia Bitter, Forrest McKee, Dorothy McKee, James O. Boyd, Robie Boyd, Arvil Jarman, Mary Jarman, William S. Holden, Virginia Holden, J. W. McCulley, J. H. Huddleston, and Richard Zacha.

VII.

On the 2nd day of May, 1963, Judge Sarah T. Hughes of the United States District Court, after hearing the arguments on the Motion to Dismiss, filed therein by the City of Dallas, ordered the cause dismissed, whereupon James P. Donovan, as attorney, in open Court requested that his exception to the ruling of the Court be noted, which was done.

VIII.

The requirements of the Writ of Prohibition issued by this Court could have been complied with by the said James P. Donovan and the other respondents by dismissing the Brown suit in the United States District Court and desisting from filing other litigation, all of which they failed and refused to do.

IX.

From the foregoing, it appears that James P. Donovan and the other respondents have violated the Writ of Prohibition and Injunction in the following respects:

1. In failing to request the Court to dismiss the cause of Daniel C. Brown et al, vs City of Dallas et al, No. 9276, pending in the United States District Court for the Northern District of Texas at Dallas, immediately upon being served with notice of the order of this Court prohibiting the further prosecution of the same; that the continued [fol. 145] disregard of the orders of this Court from the time that attorney James P. Donovan, et al, were served with notice thereof, prevents the City of Dallas from the sale and delivery of the bonds because of the pending litigation and as such, constitutes a contempt of the Court and is a continued contempt.

2. The attorney, James P. Donovan, together with all of the parties that he represents, willingly and knowingly violated the orders of this Court after notice had been given of the same by the filing of Motions in the United States District Court in cause No. 9276, styled Daniel C. Brown, et al, vs. City of Dallas, et al, which Motions contest the dismissal of said cause and are attached hereto as Exhibit "B" and made a part hereof.

3. The attorney, James P. Donovan, together with the parties who were added as new parties, to wit: William G. Byars, Mrs. L. A. Danek, G. C. Karr, Audrey M. Karr, Russell G. Rogers, Caroline Rogers, Mrs. Arlene E. Davis, Donald S. Reckrey, in the cause of Daniel C. Brown, et al vs City of Dallas, et al, No. 9276, in the United States District Court for the Northern District of Texas, Dallas Division, intentionally violated the orders of this Court in making themselves parties Plaintiff after having been given notice of the order issued from this Court in which action they were aided and abetted by James B. Donovan as their attorney and as a respondent herein; such action constitutes contempt of Court.

4. The appearance of the said James P. Donovan as attorney and on behalf of the respondents herein, and at their request to contest the Motion to Dismiss in Cause No. 9276, styled Daniel C. Brown, et al vs. City of Dallas, et al, in the United States District Court on the 2nd day of May, 1963, and therein actively opposing and contesting the

same, amounts to a direct violation of orders of this Court, and therefore constitutes Contempt of this Court.

5. The taking of exception of the Order of the United States District Court to dismiss cause No. 9276 styled Daniel C. Brown et al v City of Dallas et al, preparatory to the appeal and continued litigation of the same, is a direct violation of the orders of this Court and on its face shows an intent to violate them in the future and as such constitutes contempt of this Court.

6. By filing Cause No. CA-3-63-120 Civil, styled James [fol. 146] P. Donovan, et al, Plaintiffs, vs The Supreme Court of Texas, et al, Defendants in the United States District Court for the Northern District of Texas at Dallas, on the 23rd day of April, 1963, James P. Donovan, et al, willfully and directly violated the orders of this Court, seeking to interfere with the enforcement of the Writ of Prohibition involved herein, and as such, constitutes contempt of this Court.

Wherefore Premises Considered, This Petitioner Prays the Court that all of these respondents individually, and James P. Donovan individually, and as their attorney, be given notice to show cause why they should not be held in contempt of this Court for violation of the Writ of Prohibition and Ancillary Orders heretofore issued, and that upon such hearing they be adjudicated in contempt and be punished by adequate fine and imprisonment until such time as they have complied with the orders of the Court and have purged themselves of the contempt of this Court, and for such other orders which the Court may deem proper and necessary to give full effect to the Writ of Prohibition issued by this Court and directed to James P. Donovan, et al, Plaintiffs in the Brown suit and in any other suit that they may file.

City of Dallas, H. P. Kucera, N. Alex Bickley, By
N. Alex Bickley.

Duly sworn to by N. Alex Bickley, jurat omitted in printing.

[fol. 147]

EXHIBIT "A" TO MOTION FOR CONTEMPT

(Stamp)

MAY 2 1963.

Filed day of
19 at o'clock M.

JOHN A. LOWTHER, Clerk

By Deputy
No. 9276 CivilIN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS, DALLAS DIVISIONMOTION TO DROP CERTAIN PARTIES PLAINTIFF
AND TO ADD NEW PARTIES PLAINTIFF

DANIEL C. BROWN, et al., Plaintiffs,

vs.

CITY OF DALLAS, et al., Defendants.

To said Honorable Court:

Come now Plaintiffs in the above entitled and numbered cause, by their Attorney, James P. Donovan and move this Court for an Order permitting the withdrawal of the following named persons as Plaintiffs in the above entitled and numbered cause, viz.:

Faye Richardson, Charles Williamson, Jerry Williamson, E. W. Quinton, Geneva Quinton, Dorothy Boland, Arthur G. Rudkin, Helen Rudkin, Arthur E. Tappan, Bettie Tappan, E. Gardner Clapp, Stella Clapp, Jack H. Broom, Jane Broom, George B. Lotridge, Browning Lotridge, Lo-

metta McDonald, J. D. Lowrie, Jr., Lillian Lowrie, Anna Marie Pyland, Calvin Pylant, Lewis A. Park, Lola E. Park, S. A. Myrick, Dorothy Lusk Myrick, Robert L. Brackett, Juanity Isom, E. T. Cramer, S. R. Kirby, Jean Shaw, C. D. Crudgington, Harriet G. Crudgington, J. O. Garrett, Amy Ross Garrett, Paul Short, Besa Fairtrace Short, Arthur B. MacKinstry, III, June C. MacKinstry, James H. Murray, E. T. Busch, Louise Busch, Dr. Grant Boland, J. F. McClain, Charlene McClain, Mary R. Gore, Lawrence R. [fol. 148] Schmidt, J. M. Berry, Ethel Berry, C. J. Bitter, Patricia Bitter, Forrest McKee, Dorothy McKee, James O. Boyd, Robie Boyd, Arvil Jarman, Mary Jarman, William S. Holden, Virginia Holden, J. W. McCulley, J. H. Huddleston, and Richard Zacha.

Movant further prays this Court for an Order permitting the following named persons to intervene herein as Plaintiffs:

William G. Byars, 9603 Overlake, Dallas, Texas;
Mrs. L. A. Danek, 3024 Oradell Lane, Dallas, Texas;
G. C. Karr, 5427 Bradford, Dallas, Texas;
Audrey M. Karr, 5427 Bradford, Dallas, Texas;
Russell G. Rogers, 2823 Kendale, Dallas, Texas;
Caroline Rogers, 2823 Kendale, Dallas, Texas;
Mrs. Arlene E. Davis, 5407 Bradford, Dallas, Texas
Donald S. Reckrey, 5407 Bradford, Dallas, Texas

Respectfully submitted,

James P. Donovan, Attorney for
Plaintiffs and Intervenors
30½ Highland Park Shopping Village
Dallas 5, Texas

[fol. 149]

EXHIBIT "B" TO MOTION FOR CONTEMPT

"Plaintiffs' answer to defendants' motion and supplemental motion to dismiss" in Case No. 9276 Civil in the United States District Court omitted from the record here as it appears at printed page 290, side folio 511 ante.

[fol. 151]

EXHIBIT "C" TO MOTION FOR CONTEMPT

"Transcript of proceedings, May 2, 1963" in Case No. 9276 Civil in the United States District Court omitted from the record here as it appears at printed page 292, side folio 513 ante.

[fol. 176] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 176a] [File endorsement omitted]

[fol. 177] [File endorsement omitted]

**IN THE COURT OF CIVIL APPEALS FOR THE
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
No. 16,193**

CITY OF DALLAS et al., Petitioners,

vs.

DANIEL C. BROWN, et al., Respondents.

**RESPONDENTS' MOTION FOR CONTINUANCE—
Filed May 10, 1963**

To said Honorable Court:

State of Texas
County of Dallas

James P. Donovan, being duly sworn, deposes and says:

1.

That now and at all the times hereinafter mentioned he has been Attorney of Record for Respondents in the above entitled and numbered cause.

2.

That Deponent was on the 8th day of May, 1963 served with an Order to Show Cause, directing him to appear

before this Court at 9:00 A. M. on Monday, May 13, 1963 to show cause why he should not be punished for contempt of this Court.

3.

That Deponent has been advised that numerous Respondents whom he represents have been served with similar Orders to Show Cause as to why they should not be punished for contempt of this Court, before this Court at the same time and place; Deponent has also been advised that other similar Orders to show cause have been issued but not served upon the persons named therein.

4.

[fol. 178] That under date of April 26, 1963, the Honorable Gordon E. Young, United States District Judge for the Eastern District of Arkansas, entered an Order in the cause pending before his Court entitled James Weir v. Henry Morsheimer, et al., No. PB-62-C-19 permitting Deponent as Plaintiff's Attorney to examine the files of the Department of Agriculture of the United States at Lake Village, Chicot County, Arkansas and directed that the examination should begin on May 13, 1963; that a copy of said Order will be presented upon hearing of this Motion.

5.

That said examination can be made only by deponent and at the time stated; that Lake Village, Arkansas, the County seat of Chicot County where said files are located is difficult to reach through air transportation, and it would be impossible for Deponent to comply with the Federal Court Order if compelled to appear before this Court at 9:00 A. M. on May 13, 1963.

6.

That Deponent has been advised by an Attorney for Petitioners herein that the Orders to Show Cause issued to Deponents Clients are of three different types, and Deponent is doubtful of his ability to properly prepare defenses by Monday May 13, 1963 for the one hundred or

more clients involved, the exact number being presently unknown to deponent.

Wherefore, Deponent prays that the aforementioned hearing upon the described Orders to Show Cause why Respondents should not be punished for contempt of this [fol. 179] Court be reset for the 20th day of May, 1963, or such other date as suits the convenience of the Court.

James P. Donovan

Subscribed and sworn to before me this 9th day of May, 1963.

Mrs. John L. Ross, Notary Public, Dallas County, Texas.

[fol. 180] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 181]

IN THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

No. 16,193

CITY OF DALLAS et al., Petitioners,

vs.

DANIEL C. BROWN et al., Respondents.

RESPONDENTS' SUPPLEMENT TO MOTION FOR CONTINUANCE

To Said Honorable Court:

Comes now James P. Donovan, Attorney for Respondents herein, and in response to the request made by this Court, states that the persons for whom he requests a continuance of the contempt proceeding pending herein from May 13, 1963 to May 20, 1963 at 9:00 A. M., are:

Daniel C. Brown, Mary Brown, R. L. Pitt, Pauline Pitt, Harvey Bell, Austin Crow, Alberta R. Crow, Frank

Grimes, Lena Mae Grimes, Patricia B. Dukelow, Faye Richardson, W. H. Richardson, B. D. Siegel, Marion Lee Siegel, Paul A. Crick, Anne K. Crick, E. W. Quinton, Geneva Quinton, W. C. Jones, U. J. Boland, Dorothy Boland, Arthur G. Rudkin, Helen Rudkin, James E. Strum, Linnis Strum, Paul M. Crawford, Nora Crawford, Martin E. Collis, Jr., Norma June Collis, Arthur E. Tappan, Bettie Tappan, George Atkinson, Jack H. Broom, Jane Broom, George B. Lotridge, Browning Lotridge, J. W. Tomlin, Charline Tomlin, H. P. McDonald, Lometta McDonald, J. D. Lowrie, Jr., Lillian Lowrie, Anna Marie Pylant, Calvin Pylant, Lewis A. Park, Lola E. Park, S. A. Myrick, Dorothy Lusk Myrick, William C. Isom, Juanita Isom, Walter Sodeman, Lee R. Slaughter, Emily F. Slaughter, J. H. Parr, Joan S. Parr, J. W. Slaughter, Jr., Christine C. Slaughter, James W. Odom, Helen Odom, [fol. 182] M. J. Peñillo, Zelma Pellillo, C. D. Crudgington, Harriet G. Crudgington, Dr. Hobson Crook, Russell Moore Crook, R. C. Logan, Marion Logan, Dee Powell, Jessie Powell, E. T. Busch, Louise Busch, P. D. King, Nancy King, M. E. Worrell, Jr., Lucille Worrell, Dr. Grant Boland, Fred M. Gore, Mary R. Gore, L. A. Danek, Wayne Hood, Geneva Hood, Janet McCluer, Alberta M. Turrill, Arvil Jarman, Mary Jarman, Audrey S. Karr, Caroline Rogers, Russell G. Rogers, William G. Byars, Mrs. Arlene E. Davis, Donald S. Reckrey, Mrs. L. A. Danek, William S. Holden, Virginia Holden, James P. Donovan.

Counsel further certifies to the Court that he is authorized to represent the foregoing named persons in the aforesaid contempt proceeding.

Wherefore, Respondents pray that their Motion for Continuance filed herein on May 10, 1963 be granted as prayed for.

James P. Donovan, Attorney for Respondents, 30½ Highland Park Shopping Village, Dallas 5, Texas.

[fol. 183] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 184]

IN THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME
JUDICIAL DISTRICT OF TEXAS

No. 16,193

CITY OF DALLAS et al., Petitioners,

vs.

DANIEL C. BROWN et al., Respondents.

ORDER GRANTING CONTINUANCE—May 13, 1963

On this 13th day of May, 1963, came on to be heard the Application of certain Respondents herein for a continuance of their contempt hearings set for May 13, 1963 at 9:00 A. M. before this Court, which application was filed May 10, 1963, and the Court having heard James P. Donovan, Attorney for Respondents in support thereof and Alex Bickley, Attorney for Petitioners in opposition thereto, and this Court having requested Counsel for Respondents to file a Supplement to his Motion listing the names of the Respondents for whom he appeared herein, and said Attorney having this day complied with said request by filing herein such supplemental statement, and it appearing to this Court that there is reasonable ground for granting said Motion for Continuance, now therefore it is

Ordered that Respondents Motion for Continuance be and it is hereby granted, and the hearings set on Orders to Show Cause heretofore served upon the persons listed in Respondents' Supplement to Motion for Continuance are hereby reset for the 20th day of May, 1963 at 9:00 A. M. at which time said persons are directed to appear and answer herein.

Dick Dixon, Chief Justice, Court of Civil Appeals,
5th Supreme Judicial District of Texas.

[fol. 185] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 186]

IN THE COURT OF CIVIL APPEALS
FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

No. 16193

CITY OF DALLAS

VS.

DANIEL C. BROWN, ET AL.

Transcript of Proceedings—May 13, 1963

Be It Remembered that on the 13th day of May, A.D. 1963, before the Honorable Dick Dixon, Chief Justice of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, and the Honorable Claude Williams, Associate Justice, and the Honorable Harold A. Bateiman, Associate Justice, and without a jury; the following proceedings were had in the above styled and numbered cause.

APPEARANCES:

Mr. James P. Donovan, Dallas, Texas, For the Respondents.

Mr. Henry Kucera, City Attorney, of Dallas and: N. Alex Bickley, Assistant City Attorney of Dallas, For the Petitioners.

[fol. 187]

Proceedings**COLLOQUY ON POSTPONEMENT OF HEARING**

The Chief Justice: We have set for a hearing this morning a motion for contempt, the motion having been filed by the City of Dallas, in the matter of The City of Dallas versus Daniel C. Brown and others.

Mr. Kueera and Mr. Bickley are petitioners, and Mr. Donovan for the respondents.

Are you ready, Mr. Kucera?

Mr. Bickley: We are ready, Your Honor.

The Chief Justice: Now, Mr. Donovan appeared before us a few days ago, last Friday, I believe, and stated that he had an engagement in a Federal Court in Arkansas, and his notice to appear there was prior to the time he received notice to appear here. The notices were for the same day, so we, Mr. Bickley, representing the City, and Mr. Bickley present, we informed Mr. Donovan that we would in all probability grant the motion that he had filed for postponement of this hearing, a postponement until nine o'clock next Monday morning.

That motion has been presented to us. Mr. Donovan lists the clients whom he represents. I didn't count them. There are ninety some odd, I think.

[fol. 188] Justice Williams: Ninety-five.

The Chief Justice: Ninety-five, Judge Williams says.

The hearing on the motion for contempt, then, will be postponed as to Mr. Donovan and his clients until nine o'clock next Monday, May 20, 1963.

Is that agreeable with you, Judge Williams?

Justice Williams: Yes.

The Chief Justice: And with you?

Justice Bateman: Yes.

The Chief Justice: Very well. Now, there are a few of the persons who were cited who are not clients of Mr. Donovan. I see Mr. Waldman in the audience.

Mr. Waldman, is Mr. Donovan your attorney?

Mr. Waldman: No, sir. I told him I did not wish him to represent me in this.

The Chief Justice: Mr. Waldman came to see me a few days ago, explaining he had not agreed to go forward with any litigation and that he was of the opinion that his wife may have signed some sort of petition, probably without realizing the nature of it. Is that correct, Mr. Waldman?

Mr. Waldman: Yes, sir. I was out of town at the time [fol. 189] when the second signing came about. Now, this was signed before my wife or I received the first papers that were dated the 16th, I believe.

The Chief Justice: Was that the writ of prohibition?

Mr. Waldman: Yes, sir.

The Chief Justice: At the time you signed it, you had not been given the full particulars?

Mr. Waldman: No, sir. That was sent to my old address, and I picked it up on Tuesday evening before I was served with a summons to appear here.

The Chief Justice: Other factors would enter into it, even so. If Mr. Donovan appeared in your behalf after the writ of prohibition was received, it still will probably mean that you and your wife had participated in that hearing down there after you received the writ of prohibition.

We won't go into that, for we contemplate no action about it this morning anyway.

Mr. Waldman, what are your wishes about this?

Mr. Waldman: Well, when this started I lived in that area. I have since moved. At the time I thought it was a worthwhile cause, but I have no intention of defying any [fol. 190] court order. When the court turned this down, as far as I was concerned, I was through with it.

I have no wish whatsoever to be contemptible to any court.

The Chief Justice: Do I understand from what you say, you do not plan to continue any of this litigation, as far as you are concerned?

Mr. Waldman: As far as I am concerned, I wish no further participation, whatsoever.

The Chief Justice: What about for your wife? Can you speak for her?

Mr. Waldman: Absolutely. Yes, sir.

The Chief Justice: She has authorized you, has she, to speak for her and say that as far as any further participation in any of this litigation that has been prohibited by our writ, you understand?

Mr. Waldman: Yes, sir.

The Chief Justice: That is the litigation I refer to.

Mr. Waldman: Yes, sir.

The Chief Justice: Then, she does not intend, and will not further participate in any way, is that correct?

[fol. 191] Mr. Waldman: Yes, sir.

The Chief Justice: Thank you very much for your appearance here and for your statement. We will take no

action here, as I explained to you, this morning, Mr. Waldman. Our decision in regard to all of these people will be made probably at the same time later on, but you will be given an opportunity to know what action is taken.

Now, I see another gentleman seated there. Would you mind giving your name, please, sir?

Mr. Jones: My name is Claude Jones, Your Honor. I was one of the original plaintiffs in this case. I have not participated in any meetings since the one original meeting I got involved in.

The Chief Justice: It is not a question, Mr. Jones, of participating in a meeting. You see, it's being one of the parties to litigation.

A suit was filed* in the Federal Court, asking for an injunction against the City to prohibit building a runway.

Mr. Jones: Yes, sir.

The Chief Justice: And later on a second suit was filed in behalf of certain property owners, asking the Federal Court to issue a writ of injunction against this Court and the Supreme Court of Texas.

[fol.192] The question is not whether you attended any meetings or not. The question is whether or not you were a party plaintiff, we will say, in either of those two suits.

Were you, or not?

Mr. Jones: Well, sir, I will put it this way. Originally, I thought the cause was a good cause, and I did go along with the group, and I donated a small fee to the original contribution. But, as I say, since that time I have not met with this bunch of people, and what they have done up until now I am sure I was guilty, because I was one of the original ones.

The Chief Justice: Yes.

Mr. Jones: I have not been going to the meetings with the people is what I am trying to say.

The Chief Justice: Let me ask you this question. Apparently, as a matter of record, you are still one of the plaintiffs in that law suit?

Mr. Jones: Yes, sir.

The Chief Justice: And the question is, and you may decline to answer this if you want to, because what I am, in effect, asking you might incriminate you.

[fol. 193] Mr. Jones: Yes, sir.

The Chief Justice: Not that I am seeking to trap you at all. I am not seeking that, and I don't want to show any disrespect for any of your rights, but I will ask you the question, which you can refuse to answer if you want to.

Do you intend in the future to continue to participate as a plaintiff in the law suit pending in Federal Court?

Mr. Jones: Your Honor, in all fairness with my group of neighbors who are not here with me today, and my attorney who I was originally signed up with is not here, I think it only fair to them to not answer this question.

The Chief Justice: Very well. I won't require you to answer it. You need not.

Of course, I guess you understand, Mr. Jones, that this is a contempt hearing?

Mr. Jones: Yes, sir.

The Chief Justice: And a writ of prohibition was issued to you and to others after they had disobeyed the injunction of this Court and the writ of prohibition, and we directed you not to proceed any further with that litigation, and the City claims, and has filed a motion to that effect, [fol. 194] that in defiance of that order, you and some of the other litigants have persisted in carrying on that litigation.

Mr. Jones: Yes, sir.

The Chief Justice: If that is established as a fact, and I wouldn't prejudge the thing. I don't know. That's what the hearing is going to be about.

The City alleges that you and these other people have defied the Court's writ of prohibition and have continued to litigate.

If so, you would be liable to be held in contempt of Court, and our statute says you would be subject to a fine of one thousand dollars and twenty days in jail for each offense.

Mr. Jones: Yes, sir.

The Chief Justice: Do you realize that?

Mr. Jones: Yes, sir, I do.

The Chief Justice: All right. You will not be required to answer.

Does Mr. Donovan represent you?

Mr. Jones: Two and a half years ago when I made this one original meeting with this group of neighbors, Mr. Donovan was not present. A neighbor of mine by the name of Mr. Pellillo was the spokesman for the group. He im-[fol. 195] pressed me as being a man that was trying to do what he could and what he thought was for the good of the group of neighbors living there, and I went along with his story, and I contributed.

The Chief Justice: Here is the only purpose of my question: Mr. Donovan has filed a motion to postpone this hearing from today until a week from today, and he states in his motion that he is the authorized attorney of some ninety-five people, therefore, he is speaking for them. Now, is he speaking for you? Is he your attorney?

Mr. Jones: May I ask you a question?

The Chief Justice: Yes, sir.

Mr. Jones: If I do not want him to represent me, what course do I take?

The Chief Justice: Well, the law doesn't require you to retain him as your attorney, but if he has been your attorney but you no longer wish him to represent you, you may terminate his employment. And then, you may appear either without an attorney, if you don't want an attorney. The law doesn't require you to have an attorney. Or after you have discharged Mr. Donovan as your attorney, if he is your attorney, you are free to hire any other attorney you want.

[fol. 196] If you wish to, you can perhaps have your own attorney that has handled your affairs in other matters. Or maybe you don't. I don't know. At any rate, if you want somebody else besides Mr. Donovan to represent you, you are free to choose another attorney.

Mr. Jones: Yes, sir.

The Chief Justice: Any further questions?

Mr. Jones: No, sir. Thank you, sir.

The Chief Justice: Mr. Jones, the reason I asked whether Mr. Donovan is authorized to represent you or not, he has asked for a postponement in behalf of his clients. I don't know whether you are one of his clients or not.

Have you read this list, Mr. Bickley?

Mr. Bickley: Yes, I have, Your Honor. Mr. Jones is listed in the list as being one of the clients of Mr. Donovan.

The Chief Justice: I see. Well, Mr. Jones, let's say this: You are listed here as one of the clients of Mr. Donovan and I assume then that he is authorized to represent you and is your legally constituted attorney, and in your behalf then, he has filed this motion asking for a postponement and we have granted it.

[fol. 197] Mr. Jones: Yes, sir.

The Chief Justice: So, that adds up to this: That the matter is postponed until next Monday at nine o'clock. We appreciate your appearance this morning, and we will look forward to seeing you next Monday.

Mr. Jones: Thank you.

The Chief Justice: Are there any other questions or statements to be made? Mr. Bickley, did you have anything to say?

Mr. Bickley: If it please the Court, I would like to state this to the Court: That outside of the people that are represented by Mr. Donovan—

The Chief Justice: Yes.

Mr. Bickley: —and those represented by Mr. Gerald Johnson—

The Chief Justice: Yes.

Mr. Bickley: —and those who are not served—

The Chief Justice: Yes.

Mr. Bickley: —that there are only three parties, being Mr. and Mrs. Waldman, and Mr. Waldman has appeared here and stated his position, and a Mr. J. H. Huddleston. Mr. Huddleston has not appeared either by attorney or in person, apparently.

[fol. 198] The Chief Justice: Has he been served?

Mr. Bickley: He has been served. And the City in its— His situation is simply this, Your Honor: He did file as a party subsequent to the granting of the writ of prohibition in this cause. He filed as a plaintiff in Cause No. CA-3-63-120, civil case, in the United States District Court for the Northern District of Texas, in the nature of an injunction against the Supreme Court of Texas and against this Court.

Last Thursday when that case was called, through his attorney, Mr. Donovan, he did ask that his name be dropped from that particular cause and that he no longer be considered as prosecuting it, and this was granted by the United States District Judge at that time. And that is his situation at this particular time.

The Chief Justice: Mr. Bickley, you have heard Mr. Waldman state the situation with respect to himself and his wife, and his statement that they certainly would not further prosecute any action that they may become involved in. Do you wish to continue to keep them in your motion, or would you care to dismiss your motion as to [fol. 199] Mr. Waldman and his wife, or what is your attitude about that?

Mr. Bickley: If it please the Court, we take this attitude only. We have no intent to try to take any punitive action of any sort against anyone who will obey the orders of this Court. This is not our desire.

We do not wish to file a motion to dismiss, for the reason that we think that these people have incurred costs up until this time, and if we dismiss as to them, then, maybe they would be relieved of those costs, and some of these costs have been adjudged by the Supreme Court of Texas, and we would not wish to in any manner interfere with that.

The Chief Justice: I understand.

Mr. Bickley: However, we would have no objection to the Court relieving Mr. and Mrs. Waldman from any contempt proceedings.

The Chief Justice: All right, Mr. Waldman, you have heard the City Attorney's statement, and as I explained to you, we will not take any action in regard to you and your wife this morning. But, in view of the City Attorney's statement that he does not wish to further prosecute anyone who says they will not further litigate this matter, I [fol. 200] think Mr. Waldman can be excused from showing up next Monday morning at nine.

Do you agree, Judge Williams?

Justice Williams: Yes.

The Chief Justice: Do you agree, Judge Bateman?

Justice Bateman: Yes.

The Chief Justice: Mr. Waldman, you will be excused until further notice, then.

Mr. Waldman: All right, sir.

The Chief Justice: Perhaps it will be that it will not be necessary to give you and your wife any further notice at all, and you will be excused for the time being, unless we give you further notice. We appreciate you coming down this morning.

Mr. Waldman: Thank you, sir.

The Chief Justice: Is there anything else now, that we should go into?

Mr. Bickley: If it please the Court, we would take the same attitude as concerns J. O. Garrett, and Amy Rose Garrett, and Paul Short and Besa Fairtrace Short, represented by Mr. Gerald Johnson.

The Chief Justice: Yes, I have a motion here, Mr. Bickley. [fol. 201] Pardon me, go ahead.

Mr. Bickley: And I believe in that motion they state they will abide by the orders of this Court and that they have no one representing them in any law suit pending, and they will not have. Under these circumstances, we take the same attitude.

The Chief Justice: We will withhold final action as to them then.

You understand, Mr. Waldman, Mr. Bickley represents the City and has stated he will not file a motion to dismiss the contempt proceedings as to you and Mrs. Waldman for the reason that there may be some question about the payment of court costs. I don't know how much they might be. In other words, if the City were to move to dismiss all of these proceedings now, as to everybody it dismisses to, the costs might revolve upon the proponer of the motion, so it's just a matter of costs, court costs. I wouldn't undertake to estimate how much they might be or against whom they will be taxed.

One of our decisions will have to be that when we enter a final order in this matter of contempt proceedings, we will have to apportion the costs among the parties litigants. [fol. 202] Do you see?

Mr. Waldman: Yes, sir.

The Chief Justice: I can't say now as to how those costs will be apportioned. I don't know. But that, apparently, is the only other item pending in regard to your participation in the matter, and also this motion of contempt.

Do I make myself clear enough?

Mr. Waldman: Yes, sir. Thank you.

The Chief Justice: Is there any other question or statement from anyone?

(No response)

The Chief Justice: Then what I said in regard to Mr. and Mrs. Waldman will hold true then in regard to Mr. Paul Short, Besa Fairtrace Short, J. O. Garrett and Amy Rose Garrett, who are represented from now on by attorney Gerald L. Johnson, who has filed a motion to that effect.

Anything further?

Mr. Bickley: If it please the Court, as to Mr. Huddleston, who is not represented here either in person or by an attorney, we will abide by the wishes of this Court.

The Chief Justice: Of course, as to Mr. Huddleston, no [fol. 203] one has filed a motion for a postponement in his behalf. He may be under the impression, or he may have read it was going to be postponed.

Mr. Bickley: It could be. There was some advertising or rather, some news stories and on the radio, I understand, and that might have misled some of them.

The Chief Justice: He might have understood it was going to be postponed.

Did you have something you were going to say, Mr. Waldman?

Mr. Waldman: Yes, sir. I believe the impression was it was definitely going to be postponed and that there was to be nothing here this morning.

Mr. Bickley: I think that could well be; Your Honor.

The Chief Justice: That was true with reference to Mr. Donovan's clients because he couldn't be here. I think that if you have no objection to our postponing the matter as to—what is his name?

Mr. Bickley: J. H. Huddleston.

The Chief Justice: Do you have any objection to postponing the matter as to him?

[fol. 204] Mr. Bickley: We have no objection.

The Chief Justice: Very well. The matter will be continued or postponed, that is, passed, until next Monday morning at nine o'clock, in the matter of Mr. Huddleston.

Mr. Bickley, do you have any idea how many persons mentioned in this motion were not served with notice?

Mr. Bickley: Yes, sir. There were five who were not served.

The Chief Justice: Five?

Mr. Bickley: That is correct. And most of them are out on vacation, and about three or four of them will not be back until after June first.

The Chief Justice: I see. And do you wish to take any action as to them?

Mr. Bickley: As to them, we will have to re-serve them, Your Honor, at a later time when they are available. Mr. Donovan has appeared for two of them, I think, and he may appear for the others. I do not know. We will wait and see what shows. In his motion, he did not appear for them.

The Chief Justice: He did not?

Mr. Bickley: He did not.

The Chief Justice: I see. Well, at any rate, on our own [fol. 205] motion, we will postpone it as to those parties, giving you an opportunity to get service on them.

The Chief Justice: Is there anything else?

(No response)

The Chief Justice: Very well, Mr. Clerk?

Clerk of the Court: The Court of Civil Appeals now stands adjourned.

[fol. 206] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 207] [File endorsement omitted]

IN THE COURT OF CIVIL APPEALS
FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

No. 16,193

CITY OF DALLAS et al., Petitioners,

vs.

DANIEL C. BROWN et al., Respondents.

RESPONDENTS' MOTION TO QUASH—ANSWER TO CHARGES
OF CONTEMPT—Filed May 20, 1963

To Said Honorable Court:

Come now eighty-five Respondents in the above entitled and numbered cause and answering the Motion of the City of Dallas to Punish said Respondents for Contempt of this Court, filed herein by Alex Bickley on the 7th day of May, 1963, respectfully show this Court as follows:

1.

For the convenience of the Court the Respondents for whom this Motion and Answer are filed may be divided into three classes:

Class 1. including: George Atkinson, Harvey Bell, U. J. Boland, Daniel C. Brown, Mary Brown, Martin E. Collis, Jr., Norma June Collis, Nora Crawford, Paul Crawford, Anne K. Crick, Paul A. Crick, Dr. Hobson Crook, Russell Moore Crook, Alberta R. Crow, Austin Crow, L. A. Danek, Patricia P. Dukelow, Fred M. Gore, Frank Grimes, Lena Mae Grimes, Geneva Hood, Wayne Hood, William C. Isom, Nancy King, P. D. King, Marion Logan, R. C. Logan, Janet McCluer, H. P. McDonald, Helen Odom, Joan S. Parr, J. H. Parr, M. J. Pellillo, Zelma Pellillo, Pauline Pitt, R. L. Pitt, Dee Powell, Jessie Powell, W. H. Richardson, Marion Lee Siegel, Christine C. Slaughter,

Emily F. Slaughter, J. W. Slaughter, Jr., Lee R. Slaughter, Walter Sodeman, James E. Strum, Linnis Strum, [fol. 208] Charlene Tomlin, J. W. Tomlin, Alberta M. Turrill, and Lucille Worrell have been charged with contempt on four counts: failing to request dismissal of Federal Cause No. 9276, styled Brown v. City of Dallas; contesting the dismissal of said case; taking exception to the Court's Order of Dismissal; and filing Federal Cause No. CA-3-63-120 Civil, styled Donovan et al., v. The Supreme Court of Texas;

Class 2. including: Arvil Jarman, Mary Jarman, Dorothy Boland, Dr. Grant Boland, Jack H. Broom, Jane Broom, C. D. Crudgington, James P. Donovan, Mary R. Gore, Juanita Isom, Browning Lotridge, George B. Lotridge, Lillian Lowrie, J. D. Lowrie, Jr., Lometta McDonald, Dorothy Lusk Myrick, S. A. Myrick, Lewis A. Park, Lola E. Park, Anna Marie Pylant, Calvin Pylant, E. W. Quinton, Geneva Quinton, Faye Richardson, Arthur G. Rudkin, and Helen Rudkin, have been charged with contempt for filing Cause No. CA-3-63-120 Civil, in the United States District Court, styled Donovan et al., v. The Supreme Court of Texas et al.;

Class 3. including: William G. Byars, Mrs. L. A. Danek, Mrs. Arlene E. Davis, Audrey M. Karr, Donald S. Reckrey, Caroline Rogers and Russell G. Rogers, who are not parties to this proceeding, and were not parties in the Supreme Court Mandamus Proceeding, have been charged with contempt for joining as Parties Plaintiff in Federal Cause 9276 and contesting the dismissal thereof; and for taking exception to the Court's ruling of dismissal in said cause.

2.

Motion to Quash

The above named Respondents move this Court to quash and dismiss the charges of contempt filed against them herein by Alex Bickley, purporting to act for the Petitioner, City of Dallas and to cancel and annul any writs of prohibition or injunction alleged to have been

issued by this Court, and in support of such Motion respectfully show this Court as follows:

(a) that the Dallas City Attorney and his Assistant Alex Bickley have filed an application to punish these Respondents for contempt without first having obtained the authorization of the Mayor and Council of the City of Dallas, holding office on May 7, 1963;

(b) that with relation to the matters alleged in the Bickley Motion filed herein, no legal process has ever been issued by this Court or served upon these Respondents;

(c) that this Court's Judgment of October 24, 1962 denying Petitioners' Application for Writ of Prohibition and Ancillary Orders, became final with the denial of Petitioners' Motion for Rehearing on November 23, 1962 or within thirty days from that date, and this Court lost Jurisdiction of the subject matter of this action and the Respondents involved therein at that time;

(d) that the Supreme Court Order of March 13, 1963 granting a "conditional mandamus" to this Court was null, void, and of no effect for the following reasons:

(1) since the Supreme Court acknowledges that the Judgment in Atkinson et al., v. City of Dallas et al., was the Judgment of this Court and *not* of the Supreme Court, it could not issue a Writ under authority granted to it by Section 3 of Article 5 of the Texas Constitution;

(2) the Supreme Court was without other authority to issue such Writ except for that granted in Article 1733 of the Texas Civil Statutes which authority is limited to issuance of Writs of Mandamus "agreeable to the principles of law regulating such writs".

(3) the issuance of the Writ by the Supreme Court violated established principles of law regulating such writs by:

I. attempting to tell this Court what its Judgment should be; mandamus will issue to require entry of Judgment but not to dictate what judgment will be entered;

- II. issuing a writ when the Respondents' answer controverted the facts made the basis for the issuance of the writ by the Petition;
- III. granting a writ as a substitute for a legal remedy;
- IV. by ordering this Court to issue writs, the right to which rests soundly in the discretion of this Court, and which writs could not be sustained upon the pleadings before it;
- V. refusing to restrict the relief granted to that prayed for by the Petition in this Court, and disregarding as "technical" a principle as to Writs of Prohibition which has been recognized in common law and in Texas since law began;
- VI. assuming to exercise appellate jurisdiction not granted to it by the Texas Constitution or Statutes;
- VII. by reversing findings of fact made by this Court and making new findings of fact all as expressly prohibited by Article 1820 of the Texas Civil Statutes;
- VIII. attempting to order this court to reverse its opinion expressed in a Judgment rendered through exercise of judicial discretion within its legal jurisdiction;
- IX. by holding in effect that the only court which can pass upon a plea of res adjudicata is the Court rendering the original judgment, and then repudiating this ruling by substituting its judgment as to res adjudicata for that of this Court;
- [fol. 211] X. by predicating its opinion in part upon an unsworn statement of the Attorney General as to facts which were not alleged in the Petition for Mandamus;
- XI. ordering this Court to issue injunctions which would be violative of these Respondents' rights guaranteed by the Constitutions of the United States and Texas;
- XII. by refusing to recognize the long established rule of comity existing between federal and state courts;
- XIII. ordering this Court to issue injunctions against 14 persons who were not parties to this or the mandamus.

proceeding and assessing costs against those persons including one who is deceased.

(4) usurping authority not granted to it by the Texas Constitution or the Legislature.

(e) the final judgment entered herein under date of October 24, 1962 could not be set aside without notice to all parties to the suit and no notice of such proposed action was given to these Respondents by Petitioners;

(f) even though this Court could set aside its Judgment of October 24, 1962 without notice to these Respondents, the effect of such action would be to leave the parties in status quo prior to the entry of Judgment and they would have been entitled to notice of any motions for a new judgment embodying matters previously not decided by this Court;

(g) since the void order of the Supreme Court wholly failed to specify what writs should be issued against respondents, those respondents were entitled to Notice of any Motion made by Petitioners for such Writs and a hearing on the question of whether or not such writs could legally issue;

(h) that Respondents could not be in contempt of this [fol. 212] Court's process without having been legally served with the same in accordance with law and the rules governing, procedure in this Court and the Petitioner, City of Dallas has made no effort to comply with law or the Rules of Civil Procedure applicable to this proceeding;

(i) that Petitioners herein have never pleaded or proved that they will be irreparably injured through having to defend themselves in Federal Court, nor have they pleaded or proved that their legal remedy is inadequate, both of which elements are prerequisite to the issuance of injunction; that had they availed themselves of a Motion for Summary Judgment in the Federal case, they would now be out of Court had they been successful; their unwillingness to accept that remedy indicates that they have no valid defense to Respondents' cause alleged in the Brown Federal action;

(j) that respondents action in seeking an injunction in Federal Court against alleged illegal interference with their action in that Court cannot form the basis for contempt of this Court since it is a legal method of testing the validity of the Supreme Court Order to this Court, in a direct manner in a forum having jurisdiction; that the Appeal of the Federal Court's Order, dismissing the Brown suit, on the grounds that Respondents' were enjoined against prosecuting it, is another direct way of testing the validity of the action of the Supreme Court, and contrary to being contemptuous of this Court it represents an effort on the part of these Respondents to sustain the Judgment of this Court against the illegal reversal ordered by the Supreme Court of Texas; that having been advised by the Federal Judge that she would dismiss the suit because of this [fol. 213] injunction, Respondents' action was not contemptuous of this Court, but was taken to lay a foundation for determination by an unbiased court of competent jurisdiction of the question as to whether the Judgment of this Court, entered October 24, 1962, was correct and not subject to reversal by the Supreme Court of Texas; the action taken in Federal Court is a direct attack on the order of the Supreme Court of Texas and the validity of any orders issued under compulsion of that Court;

(k) that Respondents herein designated as Class 2, upon being queried as to their desire to continue prosecution of their actions in Federal Court in the face of full information as to the alleged order issued by this Court, instructed their Attorney to withdraw their names as Plaintiffs in those actions which withdrawal was permitted by the Federal Court at a hearing on May 2, 1963; that affiant Alex Bickley was present at Federal Court when Judge Hughes granted such permission and knew when he filed his affidavit that if ever the Class 2 Respondents were in contempt of this Court, such contempt was cured before his Application to this Court for punishment of these Respondents by fine or imprisonment.

(l) that the Respondents designated as Class 3 herein are not parties to this proceeding and were not parties to the mandamus proceeding before the Supreme Court of Texas or the case of Atkinson v. City of Dallas; neither

were they served with any legal process in any of the suits mentioned.

Wherefore, Respondents pray that this Motion to Quash Contempt Proceedings herein be granted, and that the reported reversal of the Judgment of this Court, entered herein on October 24, 1962, be rescinded and that any and [fol. 214] all orders issued herein without notice of motion to and hearing of these Respondents in opposition thereto be vacated and declared null, void and of no effect; Respondents further pray that no further proceedings be had herein until such time as the City of Dallas shall proceed in accordance with law and, if valid, the decision of the Supreme Court of Texas; Respondents further pray that they be awarded their costs of court and such other and further relief as they may be entitled to in the premises.

3.

Subject to the foregoing Motion to Quash, Respondents answering Petitioner City of Dallas' Application to punish for contempt, allege each and all of the facts and allegations contained in the foregoing Motion to Quash, and incorporate them herein with the same force and effect as if herein set out at length.

4.

Respondents further allege that the Judgment of the Supreme Court of Texas, ordering this Court to issue certain Writs against these Respondents, is not final and will be reviewed in two proceedings before the Circuit Court of Appeals of the United States, 5th Circuit, and by the United States Supreme Court if Writ of Certiorari be granted; that this Court is a party to the action pending in Federal Court under the style of Donovan v. The Supreme Court of Texas, and should not entertain this proceeding while such action is undetermined; that these Respondents would suffer irreparable injury if they were denied their rights to pursue their remedies under Federal law, and if they were punished for contempt of orders issued by this Court under an invalid order issued by the Supreme Court of Texas.

[fol. 215]

5.

Respondents further allege that they have taken no action of any kind with intentional disrespect of this Court; and that all actions taken by them have been taken upon the advice of their Attorney and in an effort to sustain the Judgment of this Court, entered herein October 24, 1962; Respondents are further informed and believe that through prosecution of the legal proceedings now pending, they will ultimately vindicate the legality and soundness of this Court's Judgment as well as this Court's unquestioned integrity.

6.

Respondents further allege that because of repeated false publications of information by City officials of Dallas, that they are not inclined to place much credence in any communication emanating from City Hall in Dallas.

7.

Further answering the Motion to Punish for contempt filed herein, Respondents deny each and every allegation in said Motion contained.

Wherefore, Respondents pray that Petitioner City of Dallas' Motion to Punish for Contempt be in all respects denied, that they be given a full hearing upon all charges made against them, that they be allowed to present evidence in their defense and have a full transcript of the proceedings recorded by an official reporter; that Petitioner be required to prove all charges made beyond a reasonable doubt, that Respondents recover their costs of suit and have such other and further relief as they may [fol. 216] be entitled to in the premises; Respondents further pray that the final Judgment entered herein vacate all orders made in this proceeding since November 23, 1962 and reinstate the Judgment of this Court entered herein on October 24, 1962; Respondents further pray that no further action be taken by this Court under the void Order of the Texas Supreme Court entered March 13, 1963.

James P. Donovan, Attorney for 85 named Respondents, 30½ Highland Park Shopping Village, Dallas 5, Texas.

[fol. 217] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 218]

IN THE COURT OF CIVIL APPEALS FOR THE
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

No. 16193

CITY OF DALLAS,

vs.

DANIEL C. BROWN, et al.

Transcript of Proceedings—May 20, 1963

Be It Remembered that on the 20th day of May, A. D. 1963, before the Honorable Dick Dixon, Chief Justice of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, and the Honorable Claude Williams, Associate Justice, and the Honorable Harold A. Bateman, Associate Justice, and without a Jury, the following proceedings were had in the above styled and numbered cause.

APPEARANCES:

Mr. James P. Donovan, Dallas, Texas, For the Respondents.

Mr. Henry Kucera, City Attorney, of Dallas, and: N. Alex Bickley, Assistant City Attorney, of Dallas, For the Petitioners.

[fol. 220]

Proceedings

The Clerk: The Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of Texas is now in session.

STATEMENT OF THE CASE

By the Chief Justice: We have set for a hearing this morning the motion of the City of Dallas to hold certain parties in contempt of court for refusing to obey an order of this Court heretofore issued. A writ of prohibition was issued, directing the parties to desist and refrain from further prosecuting and litigation seeking to restrain the issuance of bonds and the laying of a runway at Love Field.

Several parties have indicated that they desire to withdraw from the controversy. I have before me a letter from Mr. J. H. Huddleston. Will you take notice of this, please, all of the parties interested and the court reporter. I won't read the letter— Well, perhaps I had better. It's in the form of an affidavit. He says (reading), I, J. H. Huddleston, formerly of 3326 Cherrywood, of Dallas, Texas, and presently at 1117 West Randle Mill Road, it looks like, of Arlington, Texas. I wish to submit the following for the consideration of the Court. Whereas, the Court style, [fol. 221] James P. Donovan, et al, versus The Supreme Court of Texas, et al, and filed in Cause Number CA-3-63-120, In The United States District Court. It says, "James P. Donovan has represented J. H. Huddleston without J. H. Huddleston's knowledge or authority to do so. It is not J. H. Huddleston's intent or desire to enter in or participate in this or any further litigation arising from said cause. I, J. H. Huddleston, do not authorize nor intend to authorize representation by said James P. Donovan nor any other party in the above matter. No litigation concerning the above cause is intended by J. H. Huddleston at the present time or at a future time. None has been authorized in the past, to the best of my knowledge and belief. Respectfully submitted, J. H. Huddleston."

This letter arrived this morning. It's sworn to by a Notary Public. Please take notice that Mr. Huddleston has

entered what probably can be properly described as a disclaimer.

Mr. Burt, heretofore the lawyer, Gerald Johnson filed a document in behalf of certain clients of his, in which they seek to withdraw from the controversy. May I have that, please?

(File is checked by the Clerk.)

[fol. 222] The Chief Justice: I am sorry the court room isn't big enough and we don't have enough chairs to accommodate all of you. We have sent for some more chairs, if we have a recess. Even so, I don't know whether there is room enough to put enough chairs in here to accommodate everybody.

The Clerk: I don't see that. What was it?

The Chief Justice: Mr. Gerald Johnson, in behalf of a number of clients of his, filed a disclaimer, also:

We will proceed, at any rate. We will take notice of that fact and furnish the court reporter—

Mr. Bickley: (interposing) If the Court please, Mr. Johnson furnished me with a copy of that motion, which I will furnish to the Court.

The Chief Justice: Will you read me the parties?

Mr. Bickley: The motion he filed with this Court reads as follows: (reading) Comes now Paul Short and Besa Faistrace Short, J. O. Garrett and Amy Rose Garrett, by [fol. 223] and through their attorney and represent to the Court they have withdrawn as plaintiffs and will no longer prosecute or contest Cause Number 9276, pending in the United States District Court, styled Daniel C. Brown, et al, versus City of Dallas, et al, and Cause Number CA-3-63-120, Civil, in the United States District Court, styled James P. Donovan, et al, versus The Supreme Court of Texas, et al. And that they do not have representation in either of said causes and will not have.

Said parties further represent that they will in all respects abide by the rule of this Court and the writ of prohibition and ancillary orders issued by it, and that there has been no intent upon their part to violate said writ in any respect.

Wherefore, these parties pray that they be dismissed from this cause and that they not be held in contempt by this Court, but that they go hence without further action of the Court except to purge them from any and all contempt proceeding.

Respectfully submitted, Gerald L. Johnson, Attorney at Law.

The Chief Justice: Thank you. Now, last week when this hearing was originally set, Mr. Waldman, W-a-l-d-m-a-n [fol. 224] (spelling) appeared in behalf of himself and his wife and stated in open Court that he had no desire to proceed with the litigation; that he was not aware that he was a party to it; that his wife may have signed something, perhaps not realizing what it was, but in any event, both he and his wife desired to withdraw from the controversy and informed the Court in open Court, and we were in session, that he had no desire to pursue litigation and had no intention to do so.

So, please take notice for the purpose of the record that Mr. Waldman—what are his initials, or his wife's name?

Mr. Donovan: Harvey R.

The Chief Justice: Harvey R. Waldman, and what is Mrs. Waldman's name?

Mr. Donovan: I had her name as Mrs. Harvey R. Waldman.

Mr. Bickley: I believe she is listed in the proceeding, also, as Evelyn Waldman.

The Chief Justice: Evelyn Waldman?

Mr. Bickley: Yes, sir.

The Chief Justice: They have, in open Court, as a matter of record, indicated their desire not to participate, [fol. 225] any further in any litigation. In fact, Mr. Waldman said he didn't know he was a party to it.

Have you our order, Mr. Burt?

Heretofore, on the 7th day of May, we issued an order of prohibition forbidding parties from further pursuing certain litigation in the Federal Court.

Perhaps a short statement of prior events will not be out of place.

Mr. Donovan: If the Court please, may I interrupt to say it was May 7th, I think, the order to show cause was issued or application was filed on May 7th.

Mr. Bickley: Your Honor, I think what he has reference to, the Court mentioned this as a writ of prohibition on May 7th. I believe it was the order to show cause on May 7th.

The Chief Justice: The order to show cause, yes.

Getting back to what I was about to say, a suit was filed sometime ago in the State Court, District Court, by certain property owners in Love Field, in which suit they sought an injunction to restrain the City from issuing bonds and [fol. 226] from constructing the runways at Love Field. Judgment was entered denying that injunction.

An appeal was made to this Court. We entered a judgment affirming the action of the trial court in refusing the injunction.

In that opinion we said if the property owners had a cause of action it was for damages, not by way of injunction to stop the construction of improvements. I don't think we undertook to say that they did or did not have a cause of action. We said if they have one, it's for damages, not for an injunction.

The property owners undertook to appeal to the Supreme Court of Texas. The Supreme Court of Texas refused to grant a writ of error. That is the means by which you get into the Supreme Court.

By their refusal of the writ, they, in effect, stated they agreed with the decision of this Court. They may not have agreed with every word said in our opinion, but as to our judgment confirming the injunction, confirming the trial court's refusal to grant an injunction, they agreed to that. That's the effect of their refusal.

The next step, the parties undertook to appeal to the [fol. 227] Supreme Court of the United States by an application for a writ of certiorari. The Supreme Court of the United States refused to grant the writ of certiorari, thereby indicating that they, too, agreed with the decision in the case.

So, the parties had gone to the highest Court in an effort to get a judgment of injunction restraining the City from issuing the bonds and from constructing the runway.

Thereafter, the property owners, some of them the same, some different, filed a suit in the Federal Court, also seeking an injunction there.

The City filed an answer and a motion to dismiss, pleading what is called *res adjudicata*, meaning that the matter has been adjudicated and litigated, and, therefore, ought not to be litigated again.

You will realize that when a subject matter has been litigated once throughout the system of Courts to the highest Court of last resort, that it is not permissible to litigate it again. The rule is quite reasonable.

If a party were permitted to file a suit and lose it all the [fol. 228] way up to the Supreme Court of the United States, and then begin again in another trial court, there would never be an end to litigation. There would never be any stability in economies or business contracts or real estate titles. It would be impossible. If a person could again and again and again, after losing to the highest Court, litigate the same subject matter over and over again— There has to be an end to litigation.

So, the City of Dallas filed a motion with us for us to issue a writ of prohibition ordering the litigants in Federal Court to desist, because they had already gone clear to the Supreme Court of the United States.

We didn't issue the writ of prohibition for the simple reason we felt like this plea of *res adjudicata* could just as well be sustained by the Federal Court, which it afterwards was, by way of dismissal, and by this Court. And we thought it was preferable to let the matter come up in Federal Court and the suit there be dismissed on the plea of *res adjudicata*.

For that reason, and for that reason only, we didn't issue the writ of prohibition. But the City of Dallas went to a [fol. 229] Court which is superior to this one, the Supreme Court of the State of Texas, and asked the Supreme Court of the State of Texas for a writ of mandamus. That's a writ ordering us to do something.

The Supreme Court of Texas granted that application for a writ of mandamus and ordered us to proceed to issue the writ of prohibition, which we had earlier declined to issue.

Well, that's a higher Court than we are, and it is our duty to obey the Supreme Court of Texas when it issues a writ of mandamus toward us, so, we issued the writ of prohibition.

In the meantime, the second suit on the same subject matter was dismissed in the Federal Court on a plea of res adjudicata.

Then the property owners, perhaps prior to that, filed a second suit in Federal Court, in which they sought to get the Federal Court to issue an injunction against this Court and the Supreme Court of Texas, restraining us from proceeding any further with our writ of prohibition. I think last Thursday that suit was dismissed in Federal Court, too.

So, here we are at a point where on motion of the City [fol. 230] of Dallas we issued notice to the parties to appear and show cause why they should not be held in contempt of this Court, it being alleged by the City of Dallas that notwithstanding our writ of prohibition, the litigants, in defiance of our writ of prohibition, proceeded to litigate the Federal Court case of Brown versus—I guess the City of Dallas, by appearing and resisting the motion to dismiss.

So, here we are this morning, on a hearing to determine whether or not the motion that the property owners be held in contempt shall be granted or not.

Please understand the issue this morning is not whether the bonds should be issued; it is not whether an injunction should be granted restraining the City from proceeding. That has been adjudicated. It has really been adjudicated twice, in the first suit of Atkinson versus the City of Dallas, all the way from the State Court up to the United States Supreme Court, that question. It has been litigated a second time in the Federal District Court when the suit was filed and later dismissed.

So, please remember we are not here this morning to dis- [fol. 231] cuss or argue whether an injunction should be

granted. That has been litigated and the answer has been "No".

It's interesting to note that the application for injunction was presented to one judge, a State judge, a district judge, and he refused the injunction. It was brought before us, the three of us, and that makes four that said no. We affirmed the judgment.

Then, it was presented to the Supreme Court of Texas; that's nine judges down there. They refused and agreed with our judgment. Now, that's thirteen. Nine and four is thirteen.

Then, the application for writ of certiorari went to the United States Supreme Court; nine of them. That's twenty-two judges that said no. Not a dissenting opinion among them.

Then, the suit was filed over again before the Federal District Court, and that Court said no. That's twenty-three judges. Not a dissent.

So, that matter is closed. We are not here to discuss whether an injunction should be issued. That's res adjudicata.

All we are here about this morning is to determine [fol. 232] whether any or all of you should be held in contempt of court for refusing to obey a Court order to desist from proceeding with the litigation in Federal Court. That's all we are here about.

I will call the names and ask if you are present to please so indicate.

Is George Atkinson here?

Mr. Atkinson: Yes, Your Honor.

The Chief Justice: Very well, sir. You are appearing at this hearing this morning as one of the parties charged. You understand that, Mr. Atkinson?

Mr. Atkinson: I understand.

The Chief Justice: Thank you, sir.

The Chief Justice: Mr. Harvey Bell.

Mr. Donovan: I appear for Mr. Bell, Your Honor. He wasn't able to be here this morning, but he will be available.

The Chief Justice: You enter his appearance?

Mr. Donovan: Yes. I might save the Court some time. I have here a list of the persons broken down by classes, whom I appear for.

[fol. 233] The Chief Justice: Well, I had rather call this, and then you may do that. We will do both.

Mr. Donovan announces he is appearing in behalf of Mr. Harvey Bell.

Mr. U. J. Boland. Is Mr. Boland here?

Mr. Donovan: I am appearing for him, also.

Mrs. Boland: He is not here, but I am Mrs. Boland, and Mr. Donovan will represent him.

The Chief Justice: All right. Then Mr. Donovan, you represent Mr. Boland?

Mr. Donovan: Yes, sir.

The Chief Justice: And you are entering his appearance?

Mr. Donovan: That's right. I filed an answer.

The Chief Justice: Mr. Daniel C. Brown.

Mr. Brown: Here, Your Honor.

The Chief Justice: Mr. Brown, I take it you are here and entering your appearance in this hearing?

Mr. Brown: Yes.

[fol. 234] Mr. Donovan: I also appear for him, Your Honor.

The Chief Justice: You appear for Mr. Brown?

Mr. Donovan: Yes, Your Honor.

The Chief Justice: Mrs. Mary Brown.

Unidentified Person: She couldn't be here this morning.

The Chief Justice: You are entering an appearance for Mary Brown?

Mr. Donovan: Yes, Your Honor.

The Chief Justice: Mr. Martin E. Collis, Jr.

Mr. Collis: Yes, sir. Mr. Donovan is representing me.

The Chief Justice: Mrs. Norma June Collis.

Mrs. Collis: Yes, sir.

The Chief Justice: You are here in your own behalf?

Mrs. Collis: Yes, sir.

The Chief Justice: Mr. Paul S. Crawford.

Mr. Crawford: I am Paul H. Crawford. Mr. Donovan, is representing me.

[fol. 235] The Chief Justice: Thank you, Mr. Crawford. And you are entering his appearance, Mr. Donovan?

Mr. Donovan: That's right.

The Chief Justice: Mrs. Nora Crawford.

Mrs. Crawford: Yes, sir. Mr. Donovan represents me.

The Chief Justice: Mr. Donovan represents you and you are appearing.

Mr. Paul A. Crick.

Mrs. Crick: Mr. Crick is not here. I am Mrs. Crick.

The Chief Justice: You are both entering your appearance this morning?

Mrs. Crick: Yes, sir.

The Chief Justice: Do you represent them, Mr. Donovan?

Mr. Donovan: I represent both of them.

The Chief Justice: And, of course, it was Mrs. Anne K. Crick who just responded!

Mrs. Crick: Yes, sir.

The Chief Justice: Thank you.

Dr. Hobson Crook.

Dr. Crook: Here, Your Honor, and Mr. Donovan will [fol. 236] represent me.

The Chief Justice: Thank you. Russell Moore Crook.

Mr. Crook: That is my wife. I will represent her.

The Chief Justice: Thank you. Mr. Austin Crow.

Mr. Crow: Mr. Donovan will represent us.

The Chief Justice: You are adding your appearance this morning, I take it.

Mr. Crow: Yes.

The Chief Justice: When I call your name and you say Mr. Donovan is representing you, I take it you are entering your appearance this morning!

Mr. Donovan: Yes, Your Honor.

The Chief Justice: And by answering, you will so indicate. All right.

Did I call Mrs. Alberta Crow?

Mrs. Crow: Mr. Donovan is representing me and I am here.

The Chief Justice: Thank you. I quite understand. (laughter) Well, what I mean, not as a spectator, but one of the parties?

[fol. 237] Mrs. Crow: Yes, sir.

The Chief Justice: There are quite a number of people in the courthouse, you see, that might be here as disinterested spectators. Well, maybe not disinterested, like the newspaper, for instance. They are not parties to the litigation, but they are here as spectators, and I just wanted to get the capacity in which you were here clear. You see?

Mrs. Crow: I see.

The Chief Justice: All right. Mr. L. A. Danek.

Mr. Danek: I am here, Your Honor, and Mr. Donovan represents me.

The Chief Justice: Mr. Fred M. Gore.

Mr. Gore: I am here, Your Honor, and Mr. Donovan represents me.

The Chief Justice: Mr. Frank Grimes.

Mr. Grimes: I am here, Your Honor, and Mr. Donovan is representing me.

The Chief Justice: Mrs. Lena Mae Grimes.

Mrs. Grimes: I am here, and Mr. Donovan represents me.

[fol. 238] The Chief Justice: Mrs. Geneva Hood. (No response)

The Chief Justice: Is Mrs. Hood here?

Mr. Donovan: I don't think they are here, Your Honor, but I represent both Geneva Hood and Wayne Hood, and have filed an answer for them.

The Chief Justice: Thank you. Mr. William C. Isom.

Mr. Isom: Here, Your Honor, and Mr. Donovan will represent me.

The Chief Justice: Mr. W. C. Jones.

Mr. Jones: Here, Your Honor, and Mr. Donovan will represent me.

The Chief Justice: Mr. P. D. King.

Mr. King: I am here, Your Honor, and Mr. Donovan will represent me.

The Chief Justice: Mrs. Nancy King.

Mrs. King: I am here, Your Honor, and Mr. Donovan will represent me.

The Chief Justice: Mr. R. C. Logan. (No response)

The Chief Justice: Mr. Logan, do you represent him?

Mr. Donovan!

Mr. Donovan: Yes, sir. He won't be here this morning.
[fol. 239] The Chief Justice: And what about Marion Logan?

Mr. Donovan: Yes, I represent her, too. I appear for both of them this morning.

The Chief Justice: You are here for both of them?

Mr. Donovan: Yes, sir.

The Chief Justice: Mrs. Janet McCluer.

Mr. Donovan: I also represent Mrs. McCluer.

The Chief Justice: Mr. H. P. McDonald.

Mr. McDonald: Here, and Mr. Donovan will represent me.

The Chief Justice: Mr. James W. Odom.

Mr. Odom: Here, Your Honor, and Mr. Donovan will represent me.

The Chief Justice: Mrs. Helen Odom.

Mr. Odom: That's my wife. She is not here, but Mr. Donovan will represent her.

The Chief Justice: Mr. J. H. Parr.

Mr. Parr: Here, Your Honor, and Mr. Donovan is representing me.

The Chief Justice: Mrs. Joan S. Parr.

[fol. 240] Mrs. Parr: Here, Your Honor, and Mr. Donovan is representing me.

The Chief Justice: Mr. M. J. Pellillo.

Mr. Pellillo: Here, Your Honor, and Mr. Donovan represents me.

The Chief Justice: Mrs. Zelma Pellillo.

Mrs. Pellillo: Here, Your Honor, and Mr. Donovan will represent me.

The Chief Justice: Mr. R. L. Pitt.

Mr. Pitt: Here, Your Honor, and Mr. Donovan will represent me.

The Chief Justice: Mrs. Pauline Pitt.

Mrs. Pitt: Here, Your Honor, and Mr. Donovan will represent me.

The Chief Justice: Mrs. Jessie Powell.

Mrs. Powell: Here, Your Honor, and Mr. Donovan will represent me.

The Chief Justice: Mr. W. H. Richardson.

Mr. Richardson: Here, Your Honor, and Mr. Donovan will represent me.

The Chief Justice: Wait just a minute. I skipped Mr. Dee Powell. I am sorry, Mr. Powell.

[fol. 241] Mr. Powell: Here, Your Honor.

The Chief Justice: Thank you. I think Mr. Richardson responded, didn't he?

Mr. Richardson: Yes, sir.

The Chief Justice: Mr. B. D. Siegel.

Mrs. Siegel: I am Mrs. Siegel. Mr. Siegel is not here. Mr. Donovan is representing us.

Mr. Donovan: If the Court please, I don't have any record of Mr. Siegel being served.

The Chief Justice: Will you make a note, please, that Mr. Donovan has no record of Mr. Siegel's having been served.

Mr. Donovan: Nor do I have a record on W. C. Jones who was called. I don't have a record of service on him. I think Mr. Jones is here. Mr. W. C. Jones.

Mr. Jones: Here.

Mr. Donovan: Do you have a citation that was served on you?

Mr. Jones: I was subpoenaed, yes, sir.

Mr. Donovan: An order to show cause?

Mr. Jones: Yes, sir.

Mr. Donovan: May I enter my appearance in behalf of Mr. Jones because my information was that he had not [fol. 242] been served.

The Chief Justice: And you say that as far as you know, Mr. Siegel has not been served?

Mr. Donovan: No, sir. I beg your pardon, there are two W. C. Jones, Your Honor. I have one who was not served and one who was.

The Chief Justice: Are you Mr. W. C. Jones, too?

Mr. Jones: I wasn't served.

The Chief Justice: You were not served?

Mr. Jones: No, sir.

The Chief Justice: Are you here this morning in response to the motion for contempt?

Mr. Jones: I am just a spectator.

The Chief Justice: You are just a spectator. All right.

Mr. Bickley: May it please the Court, for the purpose of the record, would Mr. Jones please state what his address is for the purposes of this record, so that as a spectator he will not be misconstrued with the one who actually is a defendant in this case?

Mr. Donovan: If the Court please, I think that is highly [fol. 243] improper. Mr. Jones is not a party to the proceeding. He is just a spectator here.

The Chief Justice: Well, it isn't improper if he wants to give his address.

Mr. Donovan: That's all right.

The Chief Justice: Do you care to give your address, Mr. Jones?

Mr. Jones: Is it necessary?

The Chief Justice: No, it isn't necessary.

I didn't catch your answer.

Mr. Jones: No, sir.

The Chief Justice: Speak up so I can hear you.

Mr. Jones: No, sir.

The Chief Justice: What did Mr. Jones say?

Mr. Donovan: He doesn't care to give his address.

The Chief Justice: You refuse to give us your address?

Mr. Jones: I will if it is necessary.

The Chief Justice: It's not necessary.

Mr. Jones: No, sir.

[fol. 244] The Chief Justice: Thank you. I think Mrs. Marion Lee Siegel responded?

Mrs. Siegel: I am here.

The Chief Justice: What about Mr. Siegel?

Mrs. Siegel: Mr. Siegel is not here. He was not served.

The Chief Justice: All right. Mr. J. W. Slaughter, Jr.

Mr. Slaughter: Yes, sir. Mr. Donovan will represent me.

The Chief Justice: Mrs. Christine C. Slaughter.

Mrs. Slaughter: Here, Your Honor, and Mr. Donovan will represent me.

The Chief Justice: Mr. Walter Sodeman.

Mr. Sodeman: Here, Your Honor, and Mr. Donovan is representing me.

The Chief Justice: Mr. James E. Strum.

Mr. Strum: Here, Your Honor, and Mr. Donovan is representing me, and my wife, who is not here.

The Chief Justice: That's Mrs. Linnis Strum!

[fol. 245] Mr. Strum: Yes, sir.

The Chief Justice: Thank you. Mr. J. W. Tomlin.

Mr. Tomlin: Here, Your Honor.

The Chief Justice: And Mrs. Charline Tomlin.

Mr. Tomlin: She is not here, but Mr. Donovan will represent both of us.

The Chief Justice: Both of you?

Mr. Tomlin: Yes, sir.

The Chief Justice: Mr. M. E. Worrell, Jr.

Mr. Worrell: Here, Your Honor.

Mr. Donovan: My understanding is, Your Honor, he was not served.

Mr. Worrell: Yes, I was, too.

The Chief Justice: All right, Mr. Worrell. Mr. Donovan represents you!

Mr. Donovan: I will represent you.

The Chief Justice: Mrs. Lucille Worrell.

Mrs. Worrell: Here, Your Honor, and Mr. Donevan will represent me.

The Chief Justice: Mr. Harvey Waldman. Well, he [fol. 246] heretofore appeared and since he said he didn't know he was a party and asked out of the whole controversy in behalf of himself and his wife, Mr. Waldman was not—the motion to dismiss as to him was—I mean the motion to hold him in contempt was not dismissed, but Mr. Waldman was informed that he and his wife, in view of their statement in open Court, would not be required to attend this morning.

Mr. Audrey M. Karr.

Mrs. Karr: I am here, and Mr. Donovan will represent me.

The Chief Justice: Oh, you are Mrs. Karr?

Mr. Donovan: Yes, sir.

The Chief Justice: G. C. Karr.

Mrs. Karr: He was not served.

The Chief Justice: He was not served?

Mrs. Karr: No, sir.

The Chief Justice: All right. Mrs. William G. Byars.

Mr. Byars: Here, Your Honor, and Mr. Donovan is representing me.

The Chief Justice: Mrs. L. A. Danek.

Mr. Donovan: I represent Mrs. Danek.

The Chief Justice: You represent Mrs. Danek?

[fol. 247] Mr. Donovan: That's right.

The Chief Justice: And she is entering her appearance?

Mr. Donovan: That's right.

The Chief Justice: Mrs. Arlene E. Davis.

Mrs. Davis: Here, Your Honor, and Mr. Donovan will represent me.

The Chief Justice: Mr. Donald S. Reckrey,

Mr. Reckrey: Here. Mr. Donovan will represent me.

The Chief Justice: Mrs. Caroline Rogers.

(No response)

The Chief Justice: Is Mrs. Rogers here?

Mr. Donovan: I represent both Mrs. Caroline Rogers and Russell G. Rogers and enter an appearance for them.

The Chief Justice: You are entering an appearance. Mrs. Dorothy Boland.

Mrs. Boland: Here, Your Honor, and Mr. Donovan is representing us.

[fol. 248] The Chief Justice: Dr. Grant Boland.

Dr. Boland: Present, Your Honor, and Mr. Donovan will represent us.

The Chief Justice: Mr. Jack H. Broom.

Mr. Donovan: I represent Mr. Jack H. Broom and Jane Broom and enter an appearance for them.

Mrs. Broom: I am Jane Broom, Your Honor. I am present, and Mr. Donovan is representing me.

The Chief Justice: And Mr. Jack Broom, too, is that correct, Mr. Donovan?

Mr. Donovan: That's right, Your Honor.

The Chief Justice: Mr. C. D. Crudgington.

Mr. Crudgington: Here, Your Honor, and Mr. Donovan is representing me.

The Chief Justice: Mrs. Harriet G. Crudgington.

Mr. Crudgington: She could not be here today. Mr. Donovan is representing her.

The Chief Justice: He is entering an appearance in her behalf?

[fol. 249] Mr. Donovan: I don't know whether she was served. Has Mrs. Crudginton been served?

Mr. Crudginton: I beg your pardon.

Mr. Donovan: Was Mrs. Crudginton served by the sheriff with an order.

Mr. Crudginton: No, she was not.

Mr. Donovan: She was not served, Your Honor.

The Chief Justice: All right. Mr. James P. Donovan.

Mr. Donovan: I am here, Your Honor, representing myself. Note my appearance.

The Chief Justice: Who do you say is representing you?

Mr. Donovan: Myself. I have a fool for a client.

The Chief Justice: Mrs. Amy Rose Garrett.

Mr. Donovan: She is represented by Mr. Johnson, and there is an affidavit on file.

The Chief Justice: She withdrew from the controversy?

Mr. Donovan: That's right, Your Honor.

[fol. 250] The Chief Justice: And J. O. Garrett, too, I take it?

Mr. Donovan: Also.

The Chief Justice: So, those two are not here this morning because they filed their motion to be let out of the controversy.

Mrs. Mary R. Gore.

Mrs. Gore: I am here, Your Honor, and Mr. Donovan is representing me.

The Chief Justice: Mr. J. H. Huddleston. I read a letter from him a minute ago.

Mrs. Juanita Isom.

Mrs. Isom: Here, and Mr. Donovan is representing me.

The Chief Justice: Mr. Arvil Jarman.

Mr. Jarman: Here, Your Honor, and Mr. Donovan will represent me.

The Chief Justice: Mrs. Mary Jarman.

Mrs. Jarman: Here, Your Honor, and Mr. Donovan will represent me.

The Chief Justice: Mrs. Browning Lotridge.

Mrs. Lotridge: I am here, Your Honor, and Mr. Donovan will represent me.

[fol. 251] The Chief Justice: Mr. George B. Lotridge.

Mr. Lotridge: Present, Your Honor, and I am represented by Mr. Donovan.

The Chief Justice: J. D. Lowrie, Jr.

Mr. Donovan: I represent Mr. Lowrie, Your Honor, and note an appearance for him.

The Chief Justice: And Mrs. Lillian Lowrie?

Mr. Donovan: Also.

The Chief Justice: Thank you. This is rather tedious, but we will go ahead with it.

Arthur B. MacKinstry III.

(No response.)

Is Mr. MacKinstry here?

Mr. Bickley: He was not served, Your Honor.

The Chief Justice: He was not served?

Mr. Bickley: Nor was June C. MacKinstry, Your Honor.

The Chief Justice: Take notice of that.

Mr. Donovan: Your Honor, before the Court gets on, I am not sure that Mrs. Lowrie was served. Do you have a record on that?

Mr. Bickley: She is served.

[fol. 252] The Chief Justice: Mrs. Lometta McDonald.

Mrs. McDonald: Here, and Mr. Donovan is representing me. And I was not served.

The Chief Justice: But you are here, anyway?

Mr. Donovan: I think that is a situation, Your Honor, where the citation was handed to the husband.

Mr. Bickley: We have notice of service, Your Honor, in the file.

Mr. Donovan: That's a matter for debate. I appear for Mrs. McDonald.

The Chief Justice: Anyway, you appear for her?

Mr. Donovan: Yes, Your Honor.

The Chief Justice: Mrs. Dorothy Lusk Myrick.

Mrs. Myrick: Here, Your Honor, and Mr. Donovan represents me.

The Chief Justice: Mr. S. A. Myrick.

Mr. Myrick: Here, sir, and Mr. Donovan represents me.

The Chief Justice: Mr. Lewis A. Park.

[fol. 253] Mr. Park: Present, Your Honor, and I am represented by Mr. Donovan.

The Chief Justice: Mrs. Lola E. Park.

Mrs. Park: I am here, Your Honor, and Mr. Donovan represents me.

The Chief Justice: Mrs. Anna Marie Plyant.

(No response.)

The Chief Justice: Is Mrs. Plyant here?

Mr. Donovan: I appear for Mrs. Plyant and also for Calvin Plyant. I don't know whether he is here or not.

The Chief Justice: All right. Mrs. Geneva Quinton.

Mrs. Quinton: Here, Your Honor, and Mr. Donovan represents me.

The Chief Justice: Mr. E. W. Quinton.

Mr. Quinton: Here, Your Honor. Mr. Donovan represents me.

The Chief Justice: Is this Mrs. Faye Richardson?

Mr. Donovan: That's right, Your Honor.

[fol. 254] Mrs. Richardson: Mr. Donovan represents me.

The Chief Justice: Mr. Arthur G. Rudkin.

Mr. Rudkin: Here, Your Honor, and Mr. Donovan represents me.

The Chief Justice: Mrs. Helen Rudkin.

Mrs. Rudkin: Here, Your Honor, and Mr. Donovan represents me.

The Chief Justice: Mrs. Besa Fairtrace Short and Mr. Paul Short have filed what is in effect a disclaimer and desire to be excused. They say they will not participate in any further litigation.

Mrs. Patricia P. Dukelow.

Mrs. Dukelow: Here, Your Honor, and Mr. Donovan is representing me.

The Chief Justice: Mr. Winton R. Dukelow.

Mrs. Dukelow: Mr. Dukelow was not served.

The Chief Justice: Mrs. Emily F. Slaughter.

Mr. Slaughter: She is not here today, but Mr. Donovan is representing her and also myself.

[fol. 255] The Chief Justice: You are Mr. Lee Slaughter?

Mr. Slaughter: Yes, sir.

The Chief Justice: All right, sir. Mrs. Alberta M. Turrill.

Mr. Donovan: I don't think she is here this morning, Your Honor, but I represent her and appear for her in the proceeding.

The Chief Justice: All right.

Now, that's one group of the respondents. I will go down to the second list now.

Mr. Bickley: Your Honor, I think that covers all of them.

The Chief Justice: Is that all of them?

Mr. Bickley: I think that is right.

Mr. Donovan: These others are merely—I see.

The Chief Justice: Very well. I have announced the purpose of the hearing this morning, which is to determine whether or not you should be held in contempt of Court for refusing to obey the writ of prohibition.

Motion has been filed by the City of Dallas. Do you care [fol. 256] to present your motion, Mr. Bickley?

ARGUMENT ON MOTION FOR CONTEMPT

Mr. Bickley: Your Honor, the motion for contempt shows that this Court passed its decision in Cause Number 16038 on December 15, 1961, in Atkinson versus The City of Dallas, and I believe the Court has gone through all of the background proceedings in connection with these particular cases, and the issuance of the writ of mandamus by the Supreme Court and the subsequent writ of prohibition out of this Court.

Therefore, we will confine ourselves to the matters that have transpired since the filing of the writ of prohibition, or the entering of the writ of prohibition by this Court.

At the time the writ of prohibition was entered, a copy of it was handed to Mr. James P. Donovan, who was attorney representing the parties in the Federal Court cases, particularly in the case of Brown versus City of Dallas, which was the only case on file at that particular time.

In addition, copies of the writ of prohibition were mailed at the addresses—to the addresses of all the known litigants at that particular time. And these are the addresses that were given in their original petitions filed back in the Dis- [fol. 257] triet Court.

Since that time, and since the entering of the writ of prohibition, which we ask this Court to take judicial knowledge of, it being a judgment of this Court, the parties appeared or a portion of the parties appeared in the case of D. C. Brown versus The City of Dallas, Number 9276, In The United States District Court for the Northern District of Texas, on May 2, 1963, at which time some of the parties as listed in the order to show cause, and as shown and as distinguished in that order, asked that they be dropped from the suit of Brown versus City of Dallas.

We offer in evidence the instrument which is attached to our motion—

The Chief Justice: Just a moment, please, Mr. Bickley. We are not ready yet to receive evidence. You may present your motion and then it will be another matter in the order of business, please, sir.

Mr. Bickley: Right. In addition, at that same hearing on May 2, 1963, there were some parties that asked that they be made additional parties to that law suit. And at that time their attorney representing them stated to the United [fol. 258] States District Court that he had advised them of the writ of prohibition from this Court; that he in writing had notified them that they may be in contempt of this Court in adding themselves as new parties, and that they, in writing, had advised him they desired to be made parties in spite of that fact.

At that same time, on May 2, 1963, others of the party, through their attorney, James P. Donovan, and Mr. Donovan acting as their attorney, in disregard of the orders of this Court, filed answers to the defendant's motion and supplemental motion to dismiss, and proceeded to argue the same before the United States District Court.

At that time it was brought out in the proceeding that the writ of prohibition had been entered and that the parties were aware of it.

Subsequent to the argument in that case, Judge Sarah Hughes, of the United States District Court, dismissed on the defendant's motion the case of Brown versus City of Dallas.

Subsequent to the filing of the—or issuance of the writ of prohibition, other parties also filed a new suit in the

Federal Court, Number CA-3-63-120, styled James P. [fol. 259] ovan, as a plaintiff, and also as attorney, and others, against The Chief Justice and the members of the Supreme Court of the United States, and The Chief Justice of Texas, and The Chief Justice and the members of this Court.

At the hearing that was held on that proceeding, on Thursday, April 9th, as I recall it—I believe it was April 9th, a motion was made at that time to drop certain parties who had been plaintiffs in that law suit. And in addition, these same parties who had asked to be made a party in the suit of Brown versus City of Dallas, asked to be made parties in this law suit.

Again, Mr. Donovan stated to the Court that he had advised them that the writ of prohibition had issued from this case and that they might be in contempt in doing so, and they, in writing, so he stated, told him they wanted to be made parties to that law suit.

At that time, just a portion of the law suit was actually argued. Motions were filed on behalf of the plaintiffs in the law suit by Mr. James P. Donovan, their attorney, contesting that suit. It was argued at that time.

It was argued on the motion for a temporary injunction [fol. 260] and the Court denied any temporary injunction or temporary relief, and at the same time set down for a hearing for last Thursday, which was the 16th of April, the motion to dismiss by the defendants in that lawsuit.

Again, Mr. James P. Donovan appeared on behalf of the plaintiffs that had not been dropped from the lawsuit and argued and desisted the motion to dismiss.

The Court dismissed that lawsuit.

Now, this represents the matters that have occurred. This represents the matters that have occurred in these lawsuits in the courtroom, itself; the pleadings that have been filed.

Then, just last Thursday, Mr. Donovan on behalf of the clients that he represents in Brown versus City of Dallas, for the very first time in all of this litigation, filed ahead of the last day or next to the last day for appeal. Notice of appeal in Brown versus the City of Dallas is filed and bond in the amount of two hundred and fifty dollars, as required by the Federal Rules, showing an attempt to continue

to prosecute that lawsuit, in spite of the writ of prohibition and the orders issued by this Court.

[fol. 261] This is, in general, the matters of which we complain this morning.

The Chief Justice: Mr. Donovan, do you have a motion?

Mr. Donovan: Yes, Your Honor.

The Chief Justice: In addition to your motion, I think you have an answer and you may, if you wish, present your answer.

REPLY ARGUMENT ON BEHALF OF RESPONDENTS

Mr. Donovan: All right, Your Honor. May I first say to the Court and to the people here today and the people who have withdrawn, in protection of my own professional reputation, I filed no action in any Court anywhere without authority from the client, and that in these proceedings pending in Federal Court, the persons who changed their minds and wanted to get out were withdrawn immediately when I received instructions from them.

I also want to say in regard to Mr. Bickley's statement that I had advised these people that they ran the risk of contempt of Court. Now, in connection with that advice, I also told them it was my opinion that the order which was alleged to have been issued was invalid and that, therefore, they would not be in contempt of this Court by acting [fol. 262] contrary to it.

In addition to that, with reference to the Court's statement, I wish to state that we still maintain and we do not believe we have had adjudication.

That the facts and issues involved in the Atkinson case and the facts and issues involved in the Brown case are not the same. It has been our contention throughout that the only conclusive adjudication which can be made upon that point is by the Court which hears the evidence introduced.

I also wish to state to this Court that in thirty years of practice, I have never knowingly disobeyed a valid order of a Court nor have I ever advised a client to disobey a valid order of a Court.

However, when I took my oath of office upon admission to the Bar of the State of Texas; upon admission to the

Bar of the United States Supreme Court; upon admission to the Bar of the Supreme Court of the State of Texas; upon admission to the Bar of the State of New York; upon admission to Federal Bars in seven districts, and The Supreme Court in New Orleans, I took an oath to uphold the [fol. 263] laws of the United States; the Constitution of the United States and the Constitution of the laws of the respective States.

The lawyer's job is sometimes perilous. He has to make decisions. In addition to upholding the laws of the Court, he has a direct obligation to his clients to defend their rights and to take such legal action as is necessary in defense of their rights.

The lawyer has an additional obligation. He has the obligation to use every legal method at his disposal to sustain a judgment granted in his favor or unfavorable to his clients by a Court.

Our position in this matter is that we have done nothing in contempt of this Court. We have affirmatively stated, as shown by the record in Federal Court, that we believe that this Court was correct in its judgment rendered October 24, 1962, on which motion rehearing was denied November 23, 1962.

We have affirmatively stated that this Court only issued this order under compulsion from The Supreme Court of Texas.

We stated before The Supreme Court of Texas our reasons as to why we believed such a writ that they proposed [fol. 264] to issue should not issue. We challenged the opinion of that Court. We accused The Supreme Court of Texas to its face of insulting this Court, and we asked that they reverse the decision handed down on March 13th of this year.

Their answer was as usual, motion denied.

This case is no longer a matter of airport runways. It is now a question of civil rights.

The City of Dallas has chosen not to exercise the legal rights which it has been granted under Federal and State laws. It has used every legal device to avoid getting to a hearing of the question of the merits.

They filed an answer in Federal Court on October 13, 1962, in the Brown case, in which they stated that Court had no jurisdiction.

They also said that the Atkinson case was *res adjudicata* on all of the issues raised in the Brown case.

The next orderly move and procedure in Federal Court, or in State Courts, would have been, if the City believed it was right, to come in with a motion for summary judgment, which could have been heard in ten days, and in that ten day period of time, if the defense, which was as alleged, [fol. 265] was true and correct, I have no doubt but what the Federal Court would have thrown us out of Court.

However, the City elected not to go to trial on the truth of its claims, but sought a device by which they could avoid bringing evidence into Court or having evidence introduced against them.

For that purpose, they came to this Court and asked for a writ of prohibition. This Court will remember that in that case I fought vigorously, honestly and openly. I even attacked the qualification of the Court to hear the case.

After a hearing, this Court, by a two to one decision, ruled that the mere filing of suit in Federal Court was not an interference of its judgment and said that since that was true, there was no necessity for going further with the problems raised on their writ.

It was agreed by everyone involved that there was no appeal from that judgment. And the City, under the ruling of this Court, was obligated to go ahead with the Federal case.

But the City didn't respect the judgment of this Court. There was no avenue of appeal, so they utilized another [fol. 266] device, an application for a writ of mandamus, an original mandamus proceeding, and they filed an application in The Supreme Court of Texas in which they alleged the same facts that they had alleged before this Court, and they asked that Court to order this Court to do what this Court in the exercise of its judicial discretion had refused to do.

The case was argued before The Supreme Court of Texas. The decision of this Court was pointed out to it. The cases

were cited; the Constitution and statutes showed that Court had no jurisdiction.

On March 13th of this year we had an opinion from that Court, fourteen pages in length, in which they affirmed almost every point that had been raised before this Court, and then ordered this Court to change its decision.

Now, our position is strictly this: That The Supreme Court of Texas, when it entertained the application of the City of Dallas for a writ of mandamus, was acting outside of its jurisdiction and was usurping authority not granted to it by the Constitution of the State of Texas or the laws of the State of Texas.

[fol. 267] An examination of the Constitution reveals they only have the right to grant writs and mandamus and certiorari and so forth in their jurisdiction.

We examined The Supreme Court opinion and we find that The Supreme Court said that the judgment in the Atkinson case was not a judgment of The Supreme Court, but was a judgment of this Court of Civil Appeals, therefore, there was no help in the Constitution for The Supreme Court to exercise jurisdiction.

They then resorted to Article 1733 of the Civil Statutes of Texas, which gives The Supreme Court authority to issue writs of mandamus and other writs, to the Circuit Courts of Appeals—the Courts of Civil Appeals and the District Courts of the State of Texas. And they quoted that as the authority for their action. However, that authority in The Supreme Court to issue under the statutes a writ of mandamus is limited to the issuance agreeable to the principles of law regulating such writs.

Now, that's the point The Supreme Court in its opinion failed to emphasize. It quoted the statute and then ignored it.

[fol. 268] Let us see why it is that The Supreme Court of Texas issued a writ which is not in accord with the principles applicable to the writ of mandamus. In the first place, by their opinion, they didn't issue a firm mandamus. They issued what may be described as a conditional mandamus.

In other words, what The Supreme Court said, in effect, was, "Unless this Court did what we think is right, or does

what we think is right, we are going to hold this Court in contempt, and do it or else."

The choice that this Court then had was to refuse to obey the order of The Supreme Court and possibly decide its appeals in the county jail, or to go ahead and issue the orders.

Now, the order issued by The Supreme Court in the first place attempted to tell this Court what its judgment should be. The judgment involves an act of judicial discretion except in the event where there is a failure in pleadings or failure in appearance. Whenever there is an issue raised, discretion must be exercised. And since the beginning of the time of law in old England it has always been consistently held that a superior court will not tell a lower court how to exercise its discretion. It may direct a Court to enter judgment, but under the principles of law established throughout the years, there is no history of a valid decision where a higher court directed a lower court in an independent proceeding to tell what kind of judgment should be entered.

Now, it's possible that The Supreme Court was not exactly sure as to what it was doing. On the day that counsel appeared to answer this original proceeding in mandamus, he was advised by the Court that the hearing was set on a writ of error docket.

Now, the action that is taking place under a writ of error could have taken place where the Court has appellate jurisdiction and the power to reverse and render, then it can tell a lower court what to do. But when it comes to an original proceeding on a writ of mandamus, it does not have that authority and cannot exercise it.

Further evidence of the fact that The Supreme Court did not give this case very serious consideration is in the fact that the order entered by that Court, which assessed costs; costs were assessed against fourteen people who were not even parties to the proceeding. One of those men had died. It's pretty clear evidence of a lack of deliberation on the part of The Supreme Court of Texas. And although that has been called to the attention of the City of Dallas, no effort has been made to remove that judgment of twenty-five dollars against fourteen people that were not in the proceeding.

Another principle of law which has been good since time immemorial, a Court will not issue a writ of mandamus in any case where the facts are in controversy.

Appeal courts are not equipped for trying issues of fact. This Court stated that back in October of 1962, and in the sworn answer filed in The Supreme Court we controverted the allegations by a sworn declaration by the matters which were alleged as the basis for a writ of prohibition.

Now, on the writ of prohibition, The Supreme Court says the respondents are correct in their position that a writ of prohibition will not issue to any but a judge. But that's a technical ruling of law, so ignore it.

Since when has any Court had the power to ignore a [fol. 271] technical rule of law, particularly in the demand for an extraordinary remedy which places the life and liberty of individuals in jeopardy?

But the Court said, "Forget it; it doesn't mean anything before this Court." Yet, the cases throughout Texas have held that to be a fact since time beginning and now we are getting personal jurisprudence which is to govern the lawyers rather than press it. So, they didn't go along with the principles of law in overruling that precedent.

Another principle that has been established in mandamus since time began, since we had laws to govern men, is that the writ will not be granted as a substitute for a legal remedy.

Was there a legal remedy in this case? It has never been denied. The motion for summary judgment, ten days—ten days to get a decision by a Court of competent jurisdiction. But the City has absolutely refused since September 24, 1962 to put its case on the line before a Court and let it decide it.

It has acted by deviation and deceit and allegations which [fol. 272] I assume they cannot sustain in Court, or they would come in and put on the evidence.

I have mentioned that the Courts of all of the United States agree that where discretion is involved, no mandamus will be issued to compel the performance of a particular act. They may compel the Court by mandamus to exercise its discretion, but they cannot substitute their discretion for that Court.

Another thing, and not in accord with the principles of law, under The Supreme Court decision, Section 1820—Article 1820 of the Texas Civil Statutes, specifically says that in all cases the findings of fact made by The Court of Civil Appeals shall be final.

Now, what did The Supreme Court do to get this order the way they got it? They made a finding contrary to what this Court had found. Whether or not there is interference by an action is a question of fact, and depending upon your own discretion, you can determine whether it is or whether it isn't.

And so, The Supreme Court usurped authority denying it by statute. It is not a question of implication. The stat- [fol. 273] ute is there and it says in all cases the findings of the Court of Civil Appeals as to the facts shall be final.

It is our contention that your finding there was no interference, it was final and action of The Supreme Court in telling you that you didn't know what you were doing and your judgment was worth nothing, was absolutely illegal and insulting to this Court, as was their counsel to this Court that you cannot dismiss a case in Federal Court. Any student that has passed a year of law knows that. I thought it was a little presumptuous of the Court to assume that they were that superior.

They also went beyond the judgment of this Court. This Court had refused to pass upon the controverted question as to whether or not the issues were the same, because this Court said it was not necessary. Even under a writ of error The Supreme Court would have sent the case back here and said, "Find the rest of the facts." They didn't do that in our case. They just found all of the facts against us, and those facts are belied by the record. They said that the prayer for relief in the Atkinson case and in the Brown case were the same.

[fol. 274] If you can find any place in the Atkinson case where we prayed for an injunction to enjoin payments of outstanding revenue bonds, then I will admit The Supreme Court was correct.

That prayer is not in the Atkinson case. There was no attack on an existing issue of bonds in the Atkinson case.

but there is a definite, forthright attack on the airport revenue bonds in the Brown case. The only thing that was considered in the Atkinson case was the proposed issue and the only thing that was attacked in the Brown case is a completed issue. And those are the facts. And when The Supreme Court said the issues were identical, they absolutely misstated what was in the record.

Now, they also went on to hold that this action brought in the Atkinson case, which, as they describe it, was a hybrid class action, bound everybody who lived in the area of the airport: It is a relatively new doctrine of law and if it is true and correct and valid, then it should be very carefully applied.

They, in their order, suggested to this Court that everybody who lives in the area of Love Field be permanently [fol. 275] enjoined from ever questioning the right of the City to issue bonds under 1269J.

Are we second class citizens, we who live in the area of Love Field? Are we not permitted not to contest, whereas anyone who lives in North Dallas, away from the Field, South Dallas, Oak Cliff, or East Dallas—is that the United States?

This Court made an order to close down some little people who were fighting for their rights and at the same time, by their opinion, they left open to any taxpayer in the City of Dallas, outside of the Dallas Love Field area, the right to attack the legality of the airport revenue bonds.

Now, that order is discriminatory. It's discriminatory under the Texas Constitution; it's discriminatory under the United States Constitution. And it isn't worth, in our opinion, the paper it was written on.

Another feature of this brilliant decision of The Supreme Court of Texas, which we contend was contrary to all principles of law, I know this Court has studied that decision. And as I read it, the effect of it is to hold that a plea of res adjudicata cannot be passed upon by any Court other [fol. 276] than the Court that rendered the judgment.

If that's progress in law in the United States, then we have repudiated the law of centuries. That's not in accord with the principles of law.

Another thing that is evident in the record of The Supreme Court, they came out with a new finding which doesn't match the petition for mandamus in any way. They have said that as a matter of law the attorney general will not approve an issue of bonds when there is litigation pending.

That wasn't pleaded in the mandamus proceeding, therefore, it should not be taken into consideration.

The only thing the Court had before it to arrive at that conclusion was an old case back in 1870 where a judge made that statement and that statement was not submitted in regular argument. It was signed by the Attorney General of the State of Texas some three weeks after the argument, as a supplemental brief, which is not recognized in the rules.

The other thing that The Supreme Court of Texas failed to take into consideration, which this Court did take into [fol. 277] consideration in its decision of October, 1962, was that there existed a rule of comity between the Federal Courts and the State Courts. They brushed that out of the way. They cited a couple of cases of authority. One of them was one fellow that had been suing the University of Texas in about ten different lawsuits, and then had gone to New Mexico and filed a suit in Federal Court. Everything involving identically the same problem. Every suit.

They cited that as an authority for what they were doing here. It wasn't a case whereby the action was to dismiss the Federal suit or stop the prosecution of it. The only thing involved in that case was the application by the defendant in New Mexico to enjoin the prosecution until three consolidated cases which were on the trial docket and ready to try in the State of Texas. So, that doesn't support The Supreme Court's opinion.

We have not had a multiplicity of suits in this thing. We have had two lawsuits. One went all through the Appellate Courts and we accepted the decision in that case. And in that case, in this Court's opinion, when they denied our injunction against the proposed issue of bonds, this Court pointed out cases in the State of Texas where it was held [fol. 278] that a man in Texas cannot attack a proposed issue of bonds; that his remedy is to wait until the issue

is out and then attack it by alleging it is void and seek an injunction against payment of it.

Now, that's the accepted law in Texas. It's the law adopted by this Court and that is the law we are following in bringing our Federal suit.

Now, that is our position with reference to The Supreme Court of Texas.

Let us now come back to this Court, which was mailed a certified copy of the opinion of The Supreme Court of the State of Texas of its orders, as I understand it, and see what the procedure was following that.

This Court recalls that on October 24, 1962, it denied an application for a writ of prohibition and on November 23, 1962, it denied a motion for a rehearing on that writ.

Now, this is not a trial court, this is an appellate court. Motion for rehearing under the statutes and laws of Texas was the last action that could be taken in that suit, except one. Under the rules of this Court, the Texas rules governing this Court, an execution be issued thirty days after the [fol. 279] entry of the judgment, to collect costs.

Therefore, it is our position that on November 23, 1962, or at the latest, on December 23, 1962, the case brought by the City of Dallas against Brown and others for writ of prohibition was terminated. It ended. And when it ended the Court lost jurisdiction of the subject matter and it lost jurisdiction of the people.

Therefore, we contend that since November 23, 1962, or December 23, 1962, none of these respondents have been subject to the jurisdiction of this Court in connection with that old action. We contend that that is over and done with, and if it were not, if we are wrong in our opinion, then it is possible that a judgment entered become final for a year, and I am certain it will only bring chaos, because I know, like every lawyer, I get decisions which I think are not right. And if this Court retains jurisdiction on its denial of motion for rehearing and that is permitted to stand, I am sure that not only myself, but every other lawyer in the city that is dissatisfied is going to come back to you, and keep coming back until the term runs out.

[fol. 280] Now, if we are correct in our position, that that was a final judgment of this Court, and that this Court lost jurisdiction, then there is no authority in this Court in this proceeding to punish these people, including counsel, for contempt.

But, let's, for the purpose of argument assume that we are wrong on that point; that this Court did have the right and did retain the jurisdiction over us; are we cited for contempt charges without notice of hearing? Are we to have a hard fought judgment set aside without notice, without an opportunity to call to the Court's attention the reasons why it should not be done? Shall we be subjected to jail and fined without ever having had a word to say as to the order, which is the basis for such punishment?

Our position is that the City of Dallas, in its usual and inimitable fashion, ignored the law and brought an order to this Court for signature without complying with the requirements of notice.

Now, Mr. Bickley said I was handed an order of this Court—I don't deny it. The Honorable Chief Justice did hand me an order. But I do deny that is the order under [fol. 281] which we are being charged with contempt today, because the day after I was handed that order, or two days later, I received a communication from this Court, from the Chief Justice, sending me a copy of a new order. And that new order reversed the judgment, which the one originally given to me didn't.

So, our contention is that you can't set up a contempt proceeding on a judgment that is final without giving the parties an opportunity to be heard.

The other plaintiffs in this action have had no notice the judgment was to be set aside, the other petitioners. The respondents, other than these here, have had no notice and there are some forty-five or fifty involved, of any action setting aside the judgment they have won. No notice on that.

Now, without notice, let's say—let's say the Court has the right to set aside that judgment on its own motion. What is the effect of it? All that can happen is that it leaves the parties in *status quo*. The case is back on the trial docket and we are ready to proceed again.

Now, can one party come in and proceed without notice [fol. 282] to the other?

We submit to this Court that under the rules it cannot be done. If they are going to use this vehicle for prosecution, then they should have given us notice. There is nothing in The Supreme Court order that says what the order shall be. If they had ordered the writ of prohibition, then perhaps there would be some excuse, but they didn't. They left it to the discretion of this Court as to what orders were necessary. Did we have a right to say something about whether the order was right or wrong? Didn't we have a right at that time to present our arguments contrary to it? The City ignored our right. They went ahead and submitted an order and this Court was under an order to sign, and this Court signed it.

Now then, that was one violation. What was the next step if they wanted to bind these people in such a manner that they should be capable of enforcing these contempt proceedings against us? The next step required by the rules, the Texas Rules of Civil Procedure, would be the issuance and service of process.

Now, Rule 394 says the legal process of this Court, writs [fol. 283] and other legal processes, and this alleged order of April 16, 1963, leastly called a writ of prohibition, is another legal process, and it's a writ.

Now, that rule says that all legal processes and writs of this Court shall bear the testate of the Chief Justice under the seal of the Court and shall be attested by the Clerk of this Court. Only by compliance with the rules can legal process be issued. Only under legal process can anybody be punished for contempt of Court. That rule goes on to say that service shall be made by the sheriff, and it gives everybody the right to protect themselves.

Now, in this case, that procedure was not followed. The City put out an order, with apparently a photostatic copy of the Chief Justice's signature. It bore no seal of the Court; it was not attested to by the Clerk; and instead of having it served by the sheriff, as is the normal procedure under law, it was mailed, and it was not even mailed by registered or certified mail.

Now, under the Texas rules, attorneys in certain instances will use certified mail for proof of service, but the City does [fol. 284] not even think it necessary to send it by certified or registered mail, to alert a man of his danger of being held in contempt of Court. It is not legal process.

I mean we have a reason to doubt the credence of the City. We have had experience. And I never accept anything from the City Hall without first checking it, and I am afraid the attitude of my people is much the same way. In any event, this process was not legally issued; it was not legally served; and could not form a basis for contempt action.

Now, the same thing is true on the order to show cause. Every order to show cause which is issued here has only the signature, the photostatic signature, of the Judge of this Court. It is, therefore, not the process of this Court. It is not processed and cannot be processed until the seal is placed on the order and the Clerk has attested to the validity of it. And unless you have legal process outstanding, nobody can be punished for contempt of process.

We contend the City has wholly failed to follow the rules of law and has treated this action as a writ of error, which is not available in this proceeding.

[fol. 285] Now, another thing. The Supreme Court said, "issue necessary orders." Well, the Court, in our opinion, has shown a great disrespect for precedent in law.

We would like to assume that the direction to this Court included only legal orders; legal orders which could be issued upon the basis of pleadings before this Court.

I went back and examined the petition for the writ of prohibition which was filed herein. There isn't a single allegation in there that the plaintiff doesn't have an adequate remedy at law. I am talking about the petition, not the briefs filed, without verification. There isn't a single allegation that the petitioners did not have an adequate remedy at law.

There is no allegation that the petitioners would be irreparably damaged unless this writ was issued.

There isn't a single allegation in that petition other than the plea of res adjudicata to justify the issuance of an injunction.

Now, had we been given an opportunity to present our arguments before that writ of injunction we are charged [fol. 286] here with this morning was issued, whatever it was, we would have called that to the attention of this Court and perhaps this Court would not have issued the injunction.

It's an illegal writ as it stands.

I know The Supreme Court tried to replead our case for us, saying we should have tried our issues against the bond holders in the Atkinson case. They wanted parties that were not parties to the action, but I don't think they intended that this Court would violate the law, even though they had. When they said to issue the necessary writs, I think it left it to the discretion of this Court.

In other words, our position as to those writs, Your Honor, is that there is no valid writ of injunction; there is no valid writ of prohibition; there is no valid order of this Court prohibiting us from, doing anything on that ground alone, and we respectfully request that the contempt proceedings be dismissed.

Now, in addition to that ground, we have another. The purpose of the contempt proceeding, as counsel understands the law, is to protect the dignity of the Courts and preserve respect for those Courts.

We are charged here, under this order, with having done [fol. 287] things which shows our defiance for your orders.

Our contention is that we have shown no defiance of this Court. We have shown only our support for this Court.

Now, let's take up the various things with which they charge us with contempt. They say this order, this void order, enjoined us against further prosecution of the Brown case.

Their motion for dismissal has been on file since October 13, 1962. Nothing happened. Nobody moved it for hearing. They made the motion. They didn't want to press it. I was undisturbed, however, after this order came out of The Supreme Court of Texas and this Court was compelled to sign the order, and it did, I suddenly got a notice from the District Court that the case was set for hearing on the 25th of April. I got that notice on the morning of the 22nd, or the 23rd. Rules of law say you get five days notice, and I

went down to find out why I didn't get my five days notice about it.

We had a conference in Chambers. Judge Hughes suggested that I not defend the case or prosecute or defend [fol. 288] against the motions, but that I permit her to enter an order saying the suit was dismissed because of an injunction issued by this Court. I could then, she said, go on to the Circuit Court of Appeals and review it.

I told the Court that I didn't think this order was valid; that it was issued under compulsion; that the Court ordered the issuance without authority to do it, and I didn't accept the deal. I don't play that way.

But, it pointed out to me that the quickest review we could get of this action, to get an unbiased, unprejudiced opinion as to whether this Court was right in October or whether The Supreme Court was right in March, or to utilize the avenue of appeal which Justice Hughes offered me.

So, I went into Court in the Brown case, and I answered their motions and their supplemental motions because I wanted to point up the issue. And the record will show that Judge Hughes didn't want to hear anything about that motion that was filed way back there in October '62. She wasn't concerned with it, and she told counsel to direct his arguments to this supplemental motion which was predicated solely on the alleged writ of prohibition issued [fol. 289] by this Court. The Court didn't decide on the first motion way back there. She threw us out on the injunction and we have filed a notice of appeal to the Circuit Court of Appeals in New Orleans, where we think we can get an unbiased, unprejudiced opinion which will respect the rule of comity applied by this Court and respect our rights to prosecute in Federal Court, as was given to us by this Court.

In other words, we feel that by going to that Court we can get an unbiased, unprejudiced opinion, and I think if the chips are allowed to fall that way, I think this Court's judgment of October will be sustained.

So, we do not feel that our actions—We didn't have a word to say about the issues or anything else. In fact, in Court I told them I didn't want to talk about the Atkin-

son case; that we had been over it many times, and I didn't push the case or argue about the issues. I let the Court decide on the grounds of this injunction that is now under attack before the Circuit Court of Appeals.

Now, as to this other suit, which we were compelled to bring an action against The Supreme Court of Texas and [fol. 290] against this Court in defense of the rights of the people involved, that also was a motion. It's a direct attack on what we consider a void order. It's a direct attack on the orders of this Court, which this Court was compelled to issue under threat of contempt by The Supreme Court of Texas.

A reading of our complaint in that action by this Court, which I know the Court has received, I think will satisfy this Court that there was no disrespect to this Court. There might have been to The Supreme Court of Texas, but we are not on trial before The Supreme Court of Texas.

Now, what is contentious about that? When this Court gave us a judgment back in 1962, there was no appeal from it. So, what did the City do? They made a direct attack on that judgment before The Supreme Court of Texas.

Well, if this is contempt on our part, making a direct attack on the existing judgment before the Federal Court, which has jurisdiction of our cause, was not then the action of the City in going to The Supreme Court of Texas contempt? Are they privileged? Could they seek relief from other Courts, and are we prohibited from it? And, they have the nerve to come in here and charge some eighty-five [fol. 291] citizens with contempt. It's unthinkable.

Now, as to what took place in that action, I am saying to you is the reason we want an unbiased opinion. That action, which this Court has joined The Supreme Court of Texas, was filed. An application was made for a temporary restraining order. And I couldn't find a Judge. So, finally, when they came back to work, I went to Justice Hughes and presented my application for a restraining order. Now, the only parties to that action is The Supreme Court of Texas and the Court of Civil Appeals, this Court of Civil Appeals.

When I went in to file the suit the Court said, "Just a minute", and delayed me fifteen minutes before filing the suit. She had to go see somebody.

I don't know whether she was working for the City or not, but I do know this: That the morning I went into Judge Hughes' Court, to apply for my restraining order I was told, "Mr. Bickley has been here and wants to appear on this."

Now, a restraining order, a temporary restraining order, is an ex parte application.

[fol. 292] Mr. Bickley was not representing The Supreme Court. He was not representing the Court of Civil Appeals. But he was in there tampering with the Court before I was able to make my application. And the Court listened to him. They wouldn't let me present it until he was permitted to come in and argue against the issuance.

Now, that's why I am seeking a decision from an unbiased Court, which I consider the Circuit Court of Appeals to be.

I don't believe in backdoor jurisprudence.

Now, I was told before we ever had this hearing that this motion was going to be granted to dismiss our action.

I am still fighting to maintain the judgment of this Court in October, and I am going to use, as an individual, every legal means that can be used. And I have used every one to date.

Now, as to class two, which I have broken down in my answer to this charge, if there ever was contempt, that contempt was cured, and it was cured before this application was made by the City of Dallas.

The Chief Justice: Just a minute. Mr. Donovan, we [fol. 293] will take a recess of ten minutes, and then you may continue.

Mr. Donovan: Thank you, Your Honor.

(A ten minute recess was had at this point.)

The Chief Justice: We attempted to get a few more chairs, but this is a very busy day at the courthouse, Monday morning. Several hundred people are summonsed for the central jury room downstairs and all of the county's extra chairs were in use there. So, I am sorry to tell you that we won't be able to get additional chairs for you.

You may proceed with your argument, Mr. Donovan.

Mr. Donovan: If the Court please, the arguments which I have previously addressed to the Court apply equally

to all of the classes of persons cited for contempt in this proceeding.

In my answer, for the convenience of the Court, I have broken down the classes of contempt, if there is such a word, into three groups, which are charged with various sets of charges.

I wish to address my remarks now to what I describe [fol. 294] as class two, which is a group which was charged in substance with contempt for filing Cause Number CA-3-63-120, Civil. That is the action of Donovan against The Supreme Court of Texas, and against this Court of Civil Appeals.

I might state to the Court that on May 2, 1963, in the Brown case, I presented to the Federal District Court a list of persons who wished to withdraw from prosecution of the Brown case.

That motion was granted and those persons names were stricken from the list of plaintiffs, with the permission of the Federal Court.

At the same time I had that motion, I had a request in my possession for withdrawal of those people's names from the action entitled Donovan against The Supreme Court. However, since that action was not set, until I think it was the 9th of May, I was in no position to go in and ask relief of the Court without the presence of opposing counsel, and I had had no appearance in the action. On the day that we had the first appearance by the attorney general I appeared and presented to the Court a motion to withdraw these plaintiffs and that permission was granted.

Now, it was known to the City before they got out these [fol. 295] contempt citations on the 7th of May that the persons designated as class two had indicated their desire to withdraw from all prosecution. That was known to the City, but despite that fact, they put out some twenty-six citations to these people who had requested their attorney to ask the City to take them out of these Federal actions.

Now, we feel if there was ever any contempt of this Court in the actions of these people in participating in the Federal suits, that that attempt was cured on the second of May, 1963, when they asked to be withdrawn.

And I might say that that argument applies to these people who have come in here through other attorneys and stated that they don't want any part of the prosecution.

Before May 2nd, I was given a request to withdraw certain people. I moved with all facility under the rules of law and withdrew those people as soon as possible.

Now, the City was aware of that and I feel that this action in sending out these contempt citations is just another example of the attitude of the City.

If you cry loud enough, and threaten people enough, [fol. 296] you can get them out of your way.

I respectfully request that as to those people named in class two, that all of those citations be dismissed.

I think it's persecution, not prosecution.

Now, as we come to class three, we have another group of people, seven people in all, that was a party in the Atkinson case. Not one was a party in this proceeding before this Court. Not one was a party before The Supreme Court on the mandamus proceeding. And here, by service by mail, followed by service of an alleged order to show cause, these people are brought in here and charged with contempt, without ever having had a word to say about the order or about the case in which they are being charged.

So, I think that in all fairness the group in class three should be dismissed without any argument at all.

Now, in conclusion, Your Honor, it is the position of all of the respondents whom I represent that we have done nothing in contempt of this Court.

We have the highest respect for this Court and that respect was earned.

[fol. 297] After a rather violent action in October of 1962, this Court rendered a decision in our favor, and it is to be noted that in that decision it said, "It is with regret that we deny the motion."

That was to us a demonstration of the integrity of this Court.

Since that date, we have fought to sustain it.

On law day, May 1st, Governor Connally stated that we needed independent lawyers: that we needed independent people, to fight for their rights.

We submit to this Court that that is all that we have done.

We submit to this Court that this action taken here by a city against its own citizens seeking fine and imprisonment is unamerican.

We are involved with a conflict of jurisdiction between two sets of Courts. There should be comity between both.

This Court recognizes it. The Supreme Court doesn't. The Federal Court won't protect its jurisdiction. What can we do? Only the things permitted by law.

[fol. 298] We have appealed the case dismissed by Judge Hughes to the Circuit Court.

We will appeal the case dismissed by Judge Hughes against this Court and against The Supreme Court to the Circuit Court.

It has been suggested and was suggested by Justice Hughes that we avail ourselves of the writ of certiorari.

In my opinion as an attorney, with thirty years at the Bar, the filing of an application for a writ of certiorari to The Supreme Court decision of March 13th, without further action, would have been useless. The Court, which is overburdened with twenty-five hundred cases in arrears, is not anxious to take anything on that it doesn't need to. And had we gone on up with this suggestion, of The Supreme Court of Texas, it is very likely that that Court, The Supreme Court of the United States, would have said there is no jurisdictional controversy and refused to review.

Therefore, we had to set ourselves up; we had to expose ourselves to bring forth a case which would give The Supreme Court a jurisdictional controversy for a decision.

If it appears we are defiant of this Court, we submit [fol. 299] that we have not been.

We submit that every action taken has been in defense of this Court and that we will continue to fight until such time as the last Court in this country has said that we are wrong.

That is the heritage of the American.

We ask this Court to permit us to exercise that heritage; to dismiss this entire proceeding; to reverse the orders illegally entered. And if the Court believes it had a right to reverse the judgment on its own motion, we ask that

any further proceeding not be taken until we have had notice.

Thank you.

The Chief Justice: Mr. Donovan, your motion to quash is really what is before the Court at the moment?

Mr. Donovan: That's right.

The Chief Justice: And, of course, your argument probably includes your answer to the merits, too, I suppose?

Mr. Donovan: I believe I have covered everything, Your Honor.

The Chief Justice: The reason I am making this statement is because Mr. Bickley will now have a right to reply [fol. 300] to your presentation of your motion, if he wishes to.

Mr. Donovan has given you a copy of his motion to quash, has he?

Mr. Bickley: This morning, yes.

The Chief Justice: Do you wish to reply to his argument in favor of the motion?

REBUTTAL ARGUMENT ON BEHALF OF PETITIONERS

Mr. Bickley: If I might, Your Honor. And I would like to try to cut it just as short as possible.

I have not had thirty years at the Bar. I have only had twenty-two years at the Bar. I trust if I have fifty-two years at the Bar I can never find it in my heart to impugn the legal integrity of the judges of this Court, and of this State, and of this nation, as has been done in this Court this morning.

We talk about the heritage of an American. Only in America could this thing be done by a so-called officer of the Court. A man from New York impugned the legal integrity of The Supreme Court of the State of Texas because he does not agree with their decision. I trust I shall never find it in my heart to do so.

Yes, at times we disagree with what the Court says. We [fol. 301] needs must. But I trust we shall always keep it on a professional level. I hope I shall never have to accuse a United States District Judge of trying to make a deal with me and dealing out backdoor jurisprudence.

If the facts were known, and if they were stated to you as they occurred, he would tell you that Justice Hughes told him, "Mr. Donovan, in view of the writ of prohibition, I would suggest that I give you time to go directly to The Supreme Court and, therefore, I set this motion off long enough that you might do so." But he didn't see fit to do so.

Yes, this is America. But one of the basic tenets of America is this: That having tried out your rights to the last Court of resort in the United States, you shall then abide by the decision of that Court. And that we shall not make out of our laws a mockery, so that a handful or one or two can prevent the issuance of any bond, whether it be school or City or State, as is attempted to be done here.

I will address myself to the motion to quash, which is simply this: I will not attempt to answer all of the arguments made by counsel because they are not germane to [fol. 302] the hearing before this Court.

This Court is not sitting as an appellate court on The Supreme Court of the State of Texas, as I understand the law, and on which Mr. Donovan asks you to do. And to state that they didn't know what they were doing and they didn't understand the law and that they took advantage of him and that they were in collusion with the City of Dallas in trying to render an opinion against him, this is not germane to this proceeding.

The one question before this Court is whether or not Mr. Donovan and the other respondents are in contempt of the order issued by this Court.

The only thing he has had to say about that is simply this: He says it wasn't properly signed; it wasn't properly delivered and these parties didn't have proper notice.

If I were to agree with him in every one of these things, which I do not, it would be immaterial at this stage of the proceeding, because the cases hold beyond any reasonable doubt that having appeared and made their presence known and answered in appearance, that those mere formalities [fol. 303] are waived and they are no longer an issue in the case.

So, I think that the motion to quash, addressed only at the legality of what The Supreme Court has done, certainly is not an issue in this lawsuit. And the other, addressed to the proper giving of notice has now been waived, and there is no other issue before this Court at this time, except to adjudge these people and these cases on their merits, as to whether or not they are in contempt of this Court in the matters that they have proceeded in.

I cannot correct all of the misstatements of counsel, but there is one in particular that I would like to correct. Beyond any reasonable doubt, when Mr. Donovan represented to this Court that the City of Dallas and I, personally, and I am the one who has been dealing with the City of Dallas, and when he talked about underhanded methods and backdoor jurisprudence and these other things, I am the one he is talking about. So, when he says that I knew that certain parties wanted their names withdrawn from here on April 23rd—or on May 7th, 1963, when this Court issued this order, he is in error. He has even castigated me for going over there and trying to find out what [fol. 304] he did do in this case filed on April 23rd against this Court and against The Supreme Court. He has not seen fit to even send me copies of the motions filed by him and the notice of appeal and the appeal bond in the Brown case. He says, "The rules don't require me to do that", and "out of comity with another lawyer, I will not do it."

I am not at liberty to anticipate anything that Mr. Donovan might do, because he has not given me that liberty, and I certainly was not at liberty to take any people of his out of a lawsuit when he stated to me "I've got written authority to represent them", and particularly not the people that he came in and after being told by the Court he might be in contempt, he said, "But I have written authority to put them in." And those are number three that he has in his motion to quash, and he said, "These people haven't had a right to be heard and they should not be held in contempt."

No, they are the people who came out and said "this Court has no control over us and regardless of what might have been issued, we don't care; we are above it."

[fol. 305] I hope that I shall never live in a land where the lawyers, or any small group of people are above and beyond the Courts and the laws under which we live.

We have fought in the Courts and we think we have fought fairly, and certainly we have fought diligently, but we think the Court should uphold its opinion and that the people should realize that no one individual, and certainly no one, lawyer, and no group of people, are above and beyond the pale of justice itself.

And with that, we close our remarks on the motion to quash.

The Chief Justice: Any further argument on the motion to quash, counsel?

(Conference out of the hearing of the Reporter.)

The Chief Justice: After a conference, we have decided to overrule the motion to quash the City's motion for contempt.

Yes, Mr. Donovan?

Mr. Donovan: Your Honor, I would like to call to the attention of the Court that there are eighty-five defendants in this action, each of whom is entitled to an individual [fol. 306] trial, and that in order to prepare our proofs, we will have to have certain subpoenas, which I assume we can have issued from the Clerk. I don't know.

The Chief Justice: Mr. Donovan, you have had time to issue subpoenas heretofore.

Mr. Donovan: Well, hardly, Your Honor. I had one hundred and twenty-eight people that I had to contact to find out if they were served.

The Chief Justice: This matter was originally set for last Monday and postponed at your request.

Mr. Donovan: Well, I was in court in Arkansas. I came back and I had to prepare to question one hundred and twenty-eight.

The Chief Justice: You had time prior to that.

Mr. Donovan: I had been hopeful that this order would be quashed on my motion, but that changes the picture now, and I think we are entitled to a continuance to produce evidence and I would also like to make arrangements with

the Court for certain people to be here at certain times, rather than to keep these eighty-five people here.

The Chief Justice: They will be expected to be here, [fol. 307] Mr. Donovan.

Mr. Donovan: You are going to hold the entire eighty-five through the individual trials?

The Chief Justice: Yes, we will reach them as quickly as possible. We don't know in exactly what order.

(Conference had out of the hearing of the Reporter.)

The Chief Justice: Mr. Donovan, we will proceed with the contempt hearing.

As to the issuance of subpoenas, that will have to be handled between you and the Clerk. We will not hold up the trial, though, on that account, for it's our position that you had ample warning and an ample opportunity heretofore to issue subpoenas, and that you have not done so is your own negligence and your own failure.

We will proceed with the hearing.

Mr. Donovan: I would like to know which one is charged and which one is going to be heard, Your Honor.

The Chief Justice: Mr. Bickley, you may proceed.

Mr. Bickley: If it please the Court, all of them have been charged and we will, if the Court desires, proceed [fol. 308] individually, one by one, and we would like to have Mr. George Atkinson's case first.

The Chief Justice: Okay.

Mr. Bickley: And may it please the Court, in order to shorten the matter, we think we can introduce in evidence certain items which will cover groups of individuals and can be considered then by the Court in each case as it actually is presented.

The Chief Justice: Very well.

Mr. Bickley: The first thing I would like to present in evidence to the Court is Exhibit A, attached to our motion for contempt, which is a pleading which was introduced in evidence in the case of Brown versus City of Dallas.

Mr. Donovan: If the Court please, may I note my exception to the overruling of the order on the motion to quash?

The Chief Justice: Yes.

PRESENTATION OF EVIDENCE

Mr. Bickley: We are going to offer in evidence as Exhibit A to our motion for contempt, which is a pleading in Cause Number 9276 Civil, which is the case of Brown versus [fol. 309] the City of Dallas in the United States District Court for the Northern District of Texas, and which is a motion entitled, Motion to Drop Certain Parties Plaintiff and to Add New Parties Plaintiff, filed May 2, 1963.

We offer this in evidence, and have it marked, please.

(Petitioner's Exhibit No. 1 marked for identification by the Reporter.)

Mr. Donovan: If the Court please, in the interest of saving the time of the Court, I would like to, of course, make a general objection to the admission of any evidence on the ground that it is incompetent, immaterial, irrelevant, and that these proceedings are null and void and evidence should not be permitted.

And then, subject to that objection, I think I can facilitate things by agreeing that these documents which Mr. Bickley is producing, particularly this one here, Motion to Drop Certain Parties Plaintiff and to Add New Parties Plaintiff, is a true copy of the one before the Federal Court, and I have no objection to its admission.

The same will be true of all other documents which he produces.

[fol. 310] The Chief Justice: Very well.

Mr. Bickley: And then, as Exhibit Number Two, will you mark this, please?

(Petitioner's Exhibit No. 2 marked for identification by the Reporter.)

Mr. Bickley: We introduce in evidence, in the same cause, Number 9276, Brown versus the City of Dallas, a motion entitled, Plaintiff's Answer to Defendant's Motion and Supplemental Motion to Dismiss, filed May 2, 1963, and signed by Mr. Donovan.

Mr. Donovan: No objection, Your Honor.

The Chief Justice: Did you have that marked by the Reporter?

Mr. Bickley: Yes, I did, Your Honor.

I call attention to the Court that in Petitioner's Exhibit Number One are listed the new parties who ask leave to intervene at that time and to have their names added, and which we will bring up as the cases proceed against these individuals.

Will you mark this, please?

(Petitioner's Exhibit No. 3 marked for identification by the Reporter.)

Mr. Bickley: We offer in evidence Petitioner's Exhibit [fol. 311] Number Three, which is a transcript of the proceedings before Judge Sarah T. Hughes, United States District Judge, in Cause Number 9276 Civil, Brown versus the City of Dallas, on May 2, 1963.

Mr. Donovan: No objection.

The Chief Justice: Did you have this marked by the Reporter?

Mr. Bickley: Yes, I have it marked as Exhibit Three, Your Honor.

Will you mark this, please?

(Petitioner's Exhibit No. 4 marked for identification by the Reporter.)

Mr. Bickley: We offer in evidence Exhibit Number Four, which is the petition filed in the suit of Donovan versus The Supreme Court and this Court on April 23, 1963.

Mr. Donovan: Your Honor, I am going to object on the ground that this is a direct attack upon the order of The Supreme Court and the orders of this Court and cannot form the basis for contempt any more than the application to The Supreme Court could form the basis of contempt against Mr. Bickley, in view of the judgment of this Court in October, so we object to this exhibit as being incompetent, [fol. 312] immaterial, irrelevant, and prejudicial. We ask to have it excluded.

The Chief Justice: Overruled.

Mr. Bickley: Will you mark these, please?

(Petitioner's Exhibits Nos. 5 and 6 marked for identification by the Reporter.)

Mr. Bickley: We offer in evidence Petitioner's Exhibits Numbers Five and Six; Number Five being the notice of appeal to the Court of Civil Appeals, Fifth Circuit, in the case of Brown versus City of Dallas; and Number Six being the appellant's bond on appeal, both of which were filed on May 15, 1963.

Mr. Donovan: Now, if the Court please, we object to those as being exhibits which arose after the issuance of this order to show cause and after the filing of the affidavit as to contempt and these exhibits are not pertinent to the charges which were included and on which we stand trial today.

Mr. Bickley: If it please the Court—

The Chief Justice: Just a minute.

(Conference held out of the hearing of the Reporter.)

[fol. 313] The Chief Justice: Mr. Bickley, do you care to be heard on that objection?

Mr. Bickley: Yes, I do, Your Honor.

My answer being simply this: That this is introduced for the purpose of showing this Court a case of continued conduct and intended conduct; that there is no intent to purge themselves of the contempt of this Court, but there is an attempt to continue it and there may have to be additional cases filed as a result of these additional items at a later time.

The Chief Justice: Do you conceive, Mr. Bickley, that since this took place after our notice of intent was issued for this particular offense, if it is an offense, the parties cannot be held in contempt on this hearing?

Mr. Bickley: They cannot be held in contempt on this hearing, Your Honor, but it goes to show the intent of these parties on the other items as well.

The Chief Justice: It appears to me, then, that they should be admitted for that limited purpose.

Mr. Bickley: They are offered only for the limited purpose.

[fol. 314] Mr. Donovan: If the Court please, may I object to that offer, too, because we are here on trial in a criminal or quasi criminal action. And our charges are specific. Now, any other evidence which is not related to

those charges is not relevant or material. It would be like saying that in a burglary charge that the man attempted to burgle another store in addition. It's the same idea here. We are—and this Court is limited to proof as to what has happened in the past up to the date of the charge under the show cause orders which have been served. And anything that may have happened since that date is not relevant in this proceeding.

Mr. Bickley: If I might address myself to the Court, I think there are two matters to be considered by the Court in this respect, and one is this: This Court issued a writ of prohibition and as long as items are being filed to prosecute those suits, then there are new things arising. And as long as that suit remains on file as a bar to the enforcement of the judgment of this Court in Atkinson versus City of Dallas, it still remains a contempt of this Court.

And to the additional fact that Mr. Donovan has come [fol. 315] in this morning and he says his group one, I believe—no, group three, has purged themselves of contempt because they have asked to be dismissed from any and all lawsuits. And I point to the Court that they were not asked to be dismissed from this lawsuit against this Court and The Supreme Court until after this motion to show cause. And if it's relevant in that matter, it's relevant in all matters pertaining to the intention and to the willingness of these people to abide by the judgment of this Court.

The Chief Justice: Well, my inclination is to feel that we can only allow in evidence acts and conduct of these people up to the time of the charges against them in the motion for contempt. And if they have continued to do so, that possibly might serve as a basis for later charges of additional contempt, but I am very doubtful if it is admissible.

With the agreement of my colleagues, we will let it go into the record at the present time, but take under advisement the question of whether or not it is admissible and will be considered by us for any purpose whatsoever.

Does that suit you?

[fol. 316] Mr. Bickley: We understand the ruling of the Court.

The Chief Justice: All right. And I will ask the Court Reporter to make a note at this juncture to be called to our attention later, that we must rule on the admissibility of this evidence, and not forget it. We will go back and make a decision as to its admissibility. If it is not, we will rule it out.

Madam Court Reporter, will you make a little tab, or something, or put a little marker in your notes to remind us when this particular setting is over that we have taken this under advisement and we must rule on it and not allow it to hang in mid air?

All right, go ahead.

Mr. Bickley: And to the same effect, Your Honor, and coming under the same heading are these other three items which we would like to introduce in evidence, and I will present them to the Court.

The Chief Justice: They refer to acts and conduct of the respondent, the present charges?

Mr. Bickley: That is correct, Your Honor.

[fol. 317] The Chief Justice: And the ruling will be the same on these.

Mr. Bickley: I understand that, Your Honor.

The Chief Justice: We will take our ruling on the admissibility on those documents, each of them, under advisement for proper decision later on.

Mr. Bickley: Mark these, please.

(Petitioner's Exhibits Nos. 7, 8 and 9 marked for identification by the Reporter.)

Mr. Bickley: Our Exhibit Number Seven, which is a copy of the order of the United States District Court dismissing the cause of Brown versus City of Dallas, on the 9th day of May, 1963.

Our Exhibit Number Eight, which is a motion filed in Cause Number CA 3-63-120, on the 9th day of May, 1963, by Mr. Donovan on behalf of some of his clients, asking request of the Court to dismiss certain of those clients or to drop them from the lawsuit and to add new parties to that lawsuit.

Mr. Donovan: I have no objection to that particular [fol. 318] one going in, Your Honor.

The Chief Justice: Very well, have the Reporter mark it.

Mr. Bickley: Also, as Exhibit Number Nine, which is another motion filed in that same lawsuit on May 9, 1963, which is a motion to strike the appearance of the assistant attorney general on behalf of The Supreme Court of Texas and of this Court.

Mr. Donovan: That, I object to.

Mr. Bickley: Will you mark these, please?

(Petitioner's Exhibits Nos. 10 and 11 marked for identification by the Reporter.)

Mr. Bickley: We also introduce into evidence, under that same ruling of the Court Exhibit Number Ten, which is a copy of the proceedings before the United States District Court on May 16, 1963.

The Chief Justice: Now, Mr. Bickley, it is understood that with reference to happenings subsequent to the bringing of charges for this contempt hearing, that such evidence will be for the limited purpose of showing a continuing intent.

Mr. Bickley: That is correct.

[fol. 319] The Chief Justice: So, in keeping with your previous statement, for a limited purpose?

Mr. Bickley: That is correct.

The Chief Justice: And all of the documents and all of the evidence you are introducing as to events which took place subsequent to the bringing of charges have been introduced and will be introduced, if they are offered, for the limited purpose. Is that correct?

Mr. Bickley: That is correct. We are offering them for the limited purpose, Your Honor, not as an individual contempt as of and of itself, but to show the state of mind of the parties.

The Chief Justice: And their continuing intent?

Mr. Bickley: And their continuing intent.

The Chief Justice: Well, it will be understood distinctly that as of this moment we are not definitely deciding whether such evidence is admissible. That is the very question we are taking under advisement, and which we will decide on before the hearing is concluded.

Mr. Bickley: We understand the Court is taking that under advisement, as to whether it will be allowed or not.

[fol. 320] The Chief Justice: Very well.

Mr. Bickley: And our Exhibit Number Eleven, which is a transcript of the proceedings of May 9th in the United States District Court.

Mr. Donovan: That's in the Donovan case?

Mr. Bickley: In the case of Donovan versus Robert W. Calvert, Chief Justice, et al.

We ask this Court to take judicial knowledge of all of the proceedings had before it and before The Supreme Court of the State of Texas, of which it has been notified.

Mr. Donovan: If the Court please, I think they can take judicial notice of the proceedings of this Court, but I don't think they can take judicial notice of all of the proceedings before The Supreme Court. That would be quite a lot of material to take—

The Chief Justice: Well, we will take judicial notice, as Judge Williams says, of all of the proceedings in The Supreme Court of which we received notification, and we have received notification, of course, of the pending action in The Supreme Court of Texas, and of their subsequent [fol. 321] order and of their opinion.

Mr. Donovan: I think those things are the things that the Court can take notice of, but as far as all of the proceedings go, I think that has to be proved.

The Chief Justice: That's all that is offered.

Mr. Donovan: He said all of the proceedings, Your Honor,

Associate Justice Williams: He said we would take notice of them.

Mr. Kucera: Pardon me. Your Honor, this Court was confronted with those proceedings in The Supreme Court.

The Chief Justice: Yes, we were made parties, as someone said, parties defendant before The Supreme Court of Texas, so that as parties to that lawsuit, we take notice of what happened. Very well.

Mr. Donovan: Note my exception.

Mr. Bickley: We offer into evidence—

The Chief Justice: The objection will be overruled insofar as it seems to be aimed at any proceedings of which this Court may under the law take judicial notice, remem-

[fol. 322] bering that we were, all three of us, also parties defendant before The Supreme Court. All right.

Mr. Bickley: Will you mark this, please?

(Petitioner's Exhibit No. 12 marked for identification by the Reporter.)

Mr. Bickley: We offer in evidence Petitioner's Exhibit Number Twelve, which is a copy of the petition filed in Brown versus City of Dallas.

Mr. Donovan: There are two or three. Which one is this?

Mr. Bickley: This is Number 9276, which is Brown versus City of Dallas.

Mr. Donovan: I have no objection to that.

Mr. Bickley: If it please the Court, we think that the record evidence presented to this Court in view of the writ of prohibition and the orders issued by this Court, shows the parties that have participated in subsequent lawsuits; shows what action they have taken, and shows the matters alleged in the motion for contempt. And we think there is only one issue before this Court and that is whether or not these parties have complied with the order of this [fol. 323] Court, and have refused to prosecute any further lawsuits, and have refused to proceed with the prosecution of those suits or the filing of any additional suits, as set out in the order of this Court.

We do not know what procedure this Court would like to take in this proceeding, but we think that this record evidence established the fact that these people did, subsequent to the date of the filing of the writ and of the entry of the writ, participate in these actions and that this was contempt of this Court.

We would like, also, Your Honor, and probably we ought to introduce one other thing, which is the list of people by Mr. Burt as to those whom he mailed copies of this writ of prohibition and the ancillary orders, to show that the service was had on that particular individual by mail.

Mr. Donovan: That, I am going to object to, Your Honor, because that's illegal service. Rule 394 of the Texas Rules of Civil Procedure specifies how processes shall be

served and that is the process that has to be proved here today, not letters.

The Chief Justice: What do you say to that, Mr. Bickley? [fol. 324] Mr. Bickley: Your Honor, the cases hold that there is no way, no particular way, in which notice of writ of prohibition, or an order of a Court must be given. Any notice; through their attorney; by telephone; by wire; by mail; or by newspaper publicity is sufficient in an injunctive proceeding. The only thing that must be shown is that publicity was given to it and that they knew or they should have known by diligence of that matter.

The attorney for these people has stated in this Court that he received a copy of it and that, within itself, is sufficient.

And then, the motion to show cause was served upon the individuals personally by the deputy sheriff.

Mr. Donovan: If the Court please, I stated to this Court that I had received an order which was signed, apparently, by the Judge, without a seal and without an attestation by the Court Clerk.

I don't care about the Court's decision. Rule 394 was passed in 1942, and that specifies process of the Court [fol. 325] and the only method by which it can be issued.

It also specifies that if the process is not properly issued it can be returned to the Clerk and reissued. Now, that's the rule that controls here, and until that process is served or complied with, there is no legal process out of this Court.

It's a matter of rule, not of opinion.

Mr. Bickley: If it please the Court, we submit to the Court that this order was signed like any other judgment of this Court.

Mr. Donovan: Our position is that the other judgments are invalid, too, because the rules have to be complied with.

The Chief Justice: One at a time, please. Mr. Bickley has the floor.

Mr. Donovan: I thought he was through, Your Honor.

Mr. Bickley: —And it certainly carries the merit as a judgment of this Court.

The Chief Justice: Mr. Donovan, I interrupted you and told you not to interrupt Mr. Bickley. I just want one of

you to speak at a time, is all. If you wish to say something, we will give you an opportunity now.

[fol. 326] Mr. Donovan: We are not concerned with what has been done in other cases in this Court. We are here on a quasi criminal or a criminal charge and we have a right to insist on every T being crossed and every I being dotted. And when the rule says that the only legal process that can issue from this Court has to be over the signature of The Chief Justice and under the seal of the Court and attested by the Clerk and served by the sheriff, then until those rules are complied with, we don't think there is any legal process.

We would object to the introduction of any evidence other than proof of the orders and service in regard to the rules.

The Chief Justice: Overruled.

Mr. Donovan: Note my exception.

Mr. Bickley: We would like permission to introduce a copy and a list of all of the people to whom these items were mailed by the Clerk of this Court and we are securing that list at this time, Your Honor, and would like to have permission to put it on at a later time.

The Chief Justice: When you have your list ready, you may present it. We will rule on admissibility at that time.

[fol. 327] Mr. Bickley: May it please the Court, we think that this record evidence substantiates the charges made in the motion for contempt and if we take them up each individually, then we can take each individual case and show in which items they participated as set out in the motion for contempt.

The Chief Justice: Let me make this explanation to you. This has been pointed out to you as a quasi criminal proceeding. That being so, you cannot be required to testify. Please understand that no effort will be made or pressure put on you to testify, if you don't want to, which is some of the privileges of a person who occupies the position of defendant in a criminal case or a quasi criminal case, to decline to testify.

Also, there is a fundamental rule in our country that if a person consents to testify, but is asked a question to which the answer might tend to incriminate him, under the Fifth

Amendment of our country, if you do testify or are asked a question which might incriminate you, you fear, you don't have to answer that question.

I just wanted to inform you of your rights in this matter. [fol. 328] Now, I think that each one of you has a right to testify if you want to, or to refuse to testify.

Or, if you wish to reoffer the evidence as to each one of them—Mr. Bickley, you had better listen to me—if you wish to reoffer the evidence that you have offered as to each individual, you may simply do so by reintroducing it.

Mr. Bickley: By reference, if it's all right, Your Honor, yes.

The Chief Justice: By reference, yes.

So, who will be the first one, then?

Mr. Bickley: We will have the case against Mr. George Atkinson.

Mr. Donovan: If the Court please, do I understand that the prosecution has rested?

Mr. Bickley: No.

Mr. Donovan: Well, what are we doing now?

The Chief Justice: He is making out his case individually, as well as against each of them before.

Mr. Donevan: He is just calling the cases; he is not calling the witnesses!

[fol. 329] The Chief Justice: Well, he has no right—I doubt—at least the witness has a right to refuse to testify.

Mr. Donovan: Well, I don't know whether he is calling them or not.

Mr. Bickley: We have no right to put him on the stand, as I understand it.

The Chief Justice: All right. You are not calling him to the stand.

Mr. Atkinson: Your Honor, I understand he said the case of George Atkinson. I will be glad to testify.

Mr. Donovan: Mr. Atkinson, just wait until we find what he is going to do.

The Chief Justice: You wish to offer by referral the testimony of Mr. Atkinson?

Mr. Bickley: Yes, as to Mr. Atkinson, we refer the Court to Exhibit Number Twelve, which is the original petition in Cause Number 9276, in which Mr. George Atkin-

son is a party and represented by Mr. Donovan as his attorney.

The Chief Justice: Are you introducing each document as to him?

Mr. Bickley: As to him, yes. We are trying to keep it short.

[fol. 330] The Chief Justice: As I understand it, in the interest of time when you name a defendant, if it is true that you are re-introducing each of these documents—

Mr. Bickley: We are going to have to re-introduce each one of them, but we will do it by reference, Your Honor.

Mr. Donovan: Your Honor, please, before there is any introduction of any documents against any individual, I want proof of service on those orders. I think we are entitled to that.

The Chief Justice: You are entitled to what?

Mr. Donovan: Proof of service of legal process. That has not been proven and there is no way that they can convict us of contempt without such proof.

The Chief Justice: That will be overruled.

Mr. Donovan: Exception.

Mr. Bickley: We also introduce in evidence Exhibit Number One, Petitioner's Exhibit Number One, which is a motion filed in Brown versus City of Dallas in Cause Number 9276, to drop some parties and add others, to show that Mr. Atkinson's name was not among those that were [fol. 331] dropped.

Exhibit Number Two, which is the plaintiff's answer to defendant's answer and supplemental motion to dismiss in Cause Number 9276, styled Brown versus City of Dallas, in the United States District Court, which shows an appearance by Mr. Donovan on behalf of Mr. George Atkinson, with Mr. Atkinson as a party participant.

Also, Exhibit Number Three, which is a transcript of the proceedings, showing the appearance and the actual contesting of the motions before the United States District Court on May 2, 1963.

And also Exhibit Number Four, which is the original petition in Cause Number CA-3-63-120, in the United States District Court, which is styled Donovan, et al versus The Supreme Court of Texas, and this Court, and in which Mr.

George Atkinson is a party, which was filed subsequent to the writ of prohibition.

We think that these matters show, together with the fact that there is nothing on record to show a request to dismiss the cause, together with items of—and we introduce these other items for the limited purpose of showing [fol. 332] Mr. George Atkinson's intent not to purge himself of the contempt of the Court, but to continue to prosecute these cases.

For that limited purpose, we introduce in evidence Exhibit No. 5, which is the notice of appeal to the Circuit Court of Cause No. 9276, styled Brown versus City of Dallas.

Likewise, Petitioners Exhibit No. 6, which is the bond for the appeal.

Likewise, Exhibit No. 10, which is a copy of the transcript of proceedings on May 16th in the Federal Court, in the case of Donovan versus The Supreme Court, and this Court.

Likewise, Exhibit No. 11, which is the transcript of the proceedings on May 9th in that same case.

Also, Exhibit No. 9, which is a motion to strike the appearance of the Attorney General in the contesting of that particular action on May 9, 1963.

Mr. Donovan: I object to all of those Exhibits, Your Honor, on the grounds stated before.

The Chief Justice: Yes. Is that all of the Exhibits?

[fol. 333] Mr. Bickley: That's all we have insofar as Mr. Atkinson is concerned.

The Chief Justice: Now I am just wondering, if we go through with this same recital—how many respondents are there? Eighty eight?

Mr. Donovan: Eighty five, apart from the ones who appeared by other attorneys.

The Chief Justice: We might be late for dinner tonight, and I am just wondering if it would be possible, in the interest of time, to let Mr. Bickley call his next person and state that he introduces the same evidence with reference to that person, somewhat conditionally, as here. Does that—

Mr. Donovan: (interposing) May I make a suggestion to the Court?

The Chief Justice: Yes.

Mr. Donovan: In my answer, which I filed this morning, I have broken down the respondents here on the charges into three separate classes.

The Chief Justice: Yes.

Mr. Donovan: I believe Mr. Atkinson is in Class 1, which has the four charges. Is that right?

[fol. 334] Mr. Bickley: That is correct. And others in that same class.

Mr. Donovan: I am willing to stipulate, Your Honor, and I have a list of forty-five members, I think it is, in that class. Let me get it.

I have broken down these, and there are fifty-two in that class.

I am willing to stipulate, subject to the objections made as to against Mr. Atkinson, that these same exhibits which Mr. Bickley has presented, may be presented and considered as presented against the fifty three people constituting Class 1, and as described in the answer. That would save us repetition.

Mr. Bickley: Shall we name those individuals? Shall I name them, and then you check them to see if I am correct on the stipulation?

Mr. Donovan: Well, that is already incorporated in my answer, if you have checked that.

Mr. Bickley: I haven't had time to check it. I just got it before I walked into the courtroom, Mr. Donovan.

May I have it? I can check very shortly, Your Honor.

[fol. 335] Mr. Donovan: Also included in the answer is Class 2 and Class 3.

Mr. Bickley: May I request of the Court, I notice it is shortly before twelve o'clock. We can check these items out and maybe shorten this proceeding considerably, if we might recess for noon, and then have this checked out by the time the noon recess is over.

The Chief Justice: I think it is a splendid suggestion.

Subject to checking the accuracy of the list, do you agree to the stipulation?

Mr. Bickley: We agree to a stipulation such as that, Your Honor.

The Chief Justice: Very well. The only thing that remains is to see as to which individuals to which your stipulation applies?

Mr. Bickley: That is correct.

The Chief Justice: We will recess in just a moment now. Please though, remember you are under the jurisdiction of the Court, and you will be back please, when we resume our hearing, which will be at one thirty. We will recess until one-thirty. All of you be back then, please.

(Recess was had.)

[fol. 336] The Chief Justice: Well, when we recessed, the attorneys were going to try to agree on a list of names.

Did you do so, gentlemen?

Mr. Donovan: I have submitted the list.

I have one practical problem which I would like to submit to the Court before I start.

The Chief Justice: Yes.

Mr. Donovan: A number of people who are here, whom I represent, have children in school and with both husband and wife here it is impossible to get the kids home. So I would like permission from the Court for those people to go to take care of their children.

The Chief Justice: Yes, that's all right. It will be understood though, that they are still subject to the jurisdiction and orders of the Court.

By allowing you to do that, you understand you are not excused from the hearing.

Of course it would be quite satisfactory for you to leave to take care of the children.

You will receive appropriate notice, through your attorney or otherwise, when we will reassemble following the [fol. 337] recess this afternoon.

I suppose we probably won't conclude this hearing today. We will recess at five o'clock, in all probability, until nine Tuesday morning. That's tentative. If we should happen to finish the entire hearing this afternoon, of course it will be a different matter.

So, with that understanding, Mr. Donovan, your clients may be excused to go get their children.

Mr. Donovan: Thank you.

The Chief Justice: Now, the list of names—

Mr. Bickley: If it please the Court, I think that although we have not had time to get with opposing counsel, that we can very quickly identify the names and check for the Court and shorten the proceedings considerably.

Do you have something to check by?

Mr. Donovan: Yes, here are some extra copies. This is the same list you have.

Mr. Bickley: There are some differences.

Mr. Donovan: If the Court please, I have three extra copies here, if the Court would like to have them.

[fol. 338] The Chief Justice: Yes.

Mr. Bickley: May it please the Court, in the first group, and being the group that Mr. Donovan has designated as Class Number One, we have the following parties, and then we will introduce the evidence that pertains to all of those parties as a group.

The Chief Justice: This is by stipulation of the attorneys; is that correct?

Mr. Bickley: That is my understanding.

Mr. Donovan: That's right, Your Honor.

Mr. Bickley: We have Mr. George Atkinson; Mr. Harvey Bell; Mr. U. J. Boland; Mr. Daniel C. Brown; Mary Brown; Martin E. Collis, Jr.; Norma June Collis; Nora Crawford; Paul Crawford; Anne K. Crick; Paul A. Crick; Dr. Hobson Crook; Russell Moore Crook; Alberta R. Crow; Austin Crow and L. A. Danek.

Now, at this point, you also listed Patricia P. Dukelow, Mr. Donovan. She was not a Plaintiff in the injunction suit, and therefore would not be with this same group.

Mr. Donovan: She is charged with A, B, and C.

[fol. 339] Mr. Bickley: A, B and C, but not being a Plaintiff.

Mr. Donovan: D is stricken off.

Mr. Bickley: That is correct.

Mr. Donovan: That applies to the action in the Supreme Court?

Mr. Bickley: That is right.

Mr. Donovan: She is charged with the other three.

Mr. Bickley: That's right. We will bring her in at another time.

We strike Patricia P. Dukelow from that list because she was not a Plaintiff in the case of Donovan vs. the Supreme Court in the Federal Court.

Then, Fred M. Gore; Frank Grimes; Lena Mae Grimes; Geneva Hood; Wayne Hood; and William C. Isom.

Then, following that, we add the name of W. C. Jones, whose name is not listed on there.

Mr. Donovan: Your Honor, I would like permission of the Court to include his name in our answer as being represented by me.

The Chief Justice: Now, which one of the W. C. Joneses, is this?

[fol: 340] Mr. Bickley: Your Honor, the one on Starlight Drive, the address where he was served.

The Chief Justice: That is to be added following what name?

Mr. Bickley: Following the name of William C. Isom.

The Chief Justice: We will call him 23-A.

Mr. Bickley: Following that is Nancy King; P. D. King; Marion Logan; R. C. Logan; Janet McCluer; H. P. McDonald and Helen Odom.

And then, I believe it's on your list, Mr. Donovan, but it is not in your pleading, is James W. Odom. Will you check your pleading, please? At least, it's not on the copy.

It's on that list, Your Honor, but it is not in the pleading he filed this morning.

Mr. Donovan: Apparently that was inadvertently omitted, Your Honor, and I ask permission to add James W. Odom, with his wife, Helen Odom.

The Chief Justice: No objection.

Mr. Donovan: That is in my answer and my appearance I filed for them.

The Chief Justice: In the answer.

[fol. 341] Mr. Bickley: Then we have Joan S. Parr; J. H. Parr; M. J. Pellillo; Zelma Pellillo; Pauline Pitt; R. L. Pitt; Dee Powell; Jessie Powell; W. H. Richardson; and Marion Lee Siegel.

Your Honor, we think that B. D. Siegel's name should be added to that. I believe it's not on your list, and this morning, I believe you made the statement it was for the reason that you thought he had not been served.

Mr. Donovan: That's right, Your Honor. That was the information I had. However, I would like to add him to my answer and I will appear for him if he has been served.

The Chief Justice: All right. Mrs. Siegel?

Mrs. Siegel: Mr. Siegel has not been served.

Mr. Bickley: May we have the list of service, please?

If it please the Court, we can find out very shortly whether or not he was served.

The Chief Justice: All right, go ahead.

Mr. Donovan: Subject to the proof that he has been served, I will appear for him:

The Chief Justice: Sir?

[fol. 342] Mr. Donovan: I say, subject to proof that he has been served, we can go ahead. I will appear for him if he has been served.

The Chief Justice: We will give him time to see.

Mr. Bickley: Your Honor, here we have the service on Mr. B. D. Siegel—no, it has not been served. I am mistaken in that. The return shows that he is on vacation and will not return until after June 1, 1963. He has not been served, Your Honor.

The Court: Very well.

Mr. Bickley: It by mistake got clipped together. I am sorry.

All right. Then, following that, we have Christine C. Slaughter and J. W. Slaughter, Jr. Now, there are two names, Emily F. Slaughter and Lee R. Slaughter, that are not plaintiffs in the injunction suit and therefore would not be in this first group and the evidence presented against them.

They are the same as Dukelow was, Mr. Donovan. That's Emily F. Slaughter and Lee R. Slaughter, who will be in a different group.

The Chief Justice: Is that agreed to, Mr. Donovan?

[fol. 343] Mr. Donovan: I am not going to insist that counsel present any of it as against my clients.

The Chief Justice: We are just checking the accuracy of the list.

Mr. Donovan: I think—let me check, here—in this first group there are four charges, and in these that Mr. Bickley mentions, apparently what they have done is strike

out "D" which is the fourth charge involving the injunction suit against the Supreme Court and the Court of Civil Appeals. But as far as the first three charges, they are identical.

But, if Mr. Bickley doesn't want to present that evidence, it's agreeable with me.

Mr. Bickley: If it please the Court, they are not Plaintiffs in the suit against the Supreme Court and therefore we would not present that evidence.

The Chief Justice: That's Number 43 and 45?

Mr. Bickley: I believe that is correct, Your Honor, yes.

The Chief Justice: That's Emily F. Slaughter and Lee R. Slaughter?

Mr. Bickley: That is correct, Your Honor.

[fol. 344] Then, we have Walter Sodeman; James E. Strum; Linus Strum; Charlene Tomlin and J. W. Tomlin.

And then the next name, which is Alberta M. Turrill, is not a Plaintiff in the injunction suit either, and we would put them in a different category.

The Chief Justice: Very well.

Mr. Bickley: Then, we have Lucille Worrell. And we would add to that group the name of W. E.—or M. E. Worrell, Jr., who is her husband.

The Chief Justice: Has service been had on him?

Mr. Bickley: Yes, service has been had on him.

The Chief Justice: Are you appearing for him, Mr. Donovan?

Mr. Donovan: I will appear for him and move to amend my answer to include his name as being one of the persons I represent.

The Chief Justice: Now, that's M. E.—

Mr. Donovan: M. E. Worrell, W-o-r-r-e-l-l, (spelling).

[fol. 345] Mr. Bickley: Jr.

Mr. Donovan: Jr.

The Chief Justice: All right.

Mr. Bickley: May it please the Court, as to this group of Defendants that have just been named, we would introduce in evidence the following exhibits that have been presented to this Court: Number One, which is our Exhibit Number Twelve, the Petition in the Brown case,

No. 9276, styled Daniel Brown vs. City of Dallas, in the United States District Court.

Our Exhibit Number One, which is the Motion in the Brown case to drop parties and add parties. We would show that none of these parties were dropped after having entered into the Petition.

Number Two, our Exhibit Number Two, which is the Plaintiff's Answer in the Brown case following the issuance of the writ of prohibition, which shows that they did answer and continue to prosecute that cause.

Our Exhibit Number Three, which is the transcript of the proceedings in that cause following the issuance of the writ of prohibition by this Court.

Our Exhibit Number Four, which shows the Petition by [fol. 346] Mr. Donovan and others in Cause No. 3-63-120, Civil, in the United States District Court, styled Donovan against Chief Justice Calvert, et al., which is the case against the Supreme Court and this Court.

Then, on the conditional submission to show the continued course of conduct on the part of these individuals, although they are not specific charges as made in the Motion for Contempt, but to show that they have no intention of purging themselves, we introduce—

The Chief Justice: For that limited purpose?

Mr. Bickley: For that limited purpose. That is correct, Your Honor.

Mr. Bickley: —We introduce our Exhibit Number Seven, which is the Order dismissing the Brown suit.

Our Exhibit Number Five, which is the Notice of Appeal from the Brown suit by Mr. Donovan and his clients.

Our Exhibit Number Six, which is the bond filed with the Notice of Appeal.

And in addition thereto, and for the same limited purpose, our Exhibit Number Eight, which is the Motion to [fol. 347] Add and Drop Parties in the suit of Donovan against the Supreme Court.

Our Number Nine, which is the Motion to Strike the Appearance of the Attorney General and the Answer of these parties in the case of Donovan against the Supreme Court.

Our Exhibit Number Ten, which is a transcript of the proceedings, and our Exhibit Number Eleven, which is also a transcript of the proceedings in the case of Donovan against the Supreme Court.

Mr. Bickley: Mark these, please.

(Petitioners Exhibits No. 13 and 14—marked for identification by the reporter.)

Mr. Bickley: In addition thereto, I introduce in evidence our Exhibit Number Thirteen, which is a pleading filed in this lawsuit, a Motion for Continuance.

And, in addition thereto, our Exhibit Number Fourteen, which is a Supplemental Motion for Continuance, both of which were filed by Mr. Donovan, and Number Fourteen, which states the names of his clients that he is representing.

The Chief Justice: Where was the Motion for Continuance filed?

[fol. 348] Mr. Donovan: In this proceeding, Your Honor.

Mr. Bickley: In this proceeding, Your Honor.

Mr. Bickley: In addition thereto, we would like to introduce in evidence—

The Chief Justice: Mr. Bickley, Judge Bateman wants to know if you are introducing this last document conditionally.

Mr. Bickley: No, it is not conditionally introduced, Your Honor. This is introduced for all purposes.

The Chief Justice: All right.

Mr. Bickley: Will you mark these, please?

(Petitioners Exhibits No. 15 and 16 marked for identification by the reporter.)

Mr. Bickley: We introduce in evidence Petitioner's Exhibit Number Fifteen, which was our Petition for Writ of Mandamus to the Supreme Court of Texas in this cause, and Exhibit Number Sixteen, which were the attachments with that Exhibit, and the Exhibits attached to it.

Mr. Donovan: If the Court please, I am going to object [fol. 349] to these. For one thing, the Exhibit Number Fifteen is not the Petition for Writ of Mandamus. I have no objection to the Petition for Writ of Mandamus going in,

but this includes a brief in support of the Petition, and I certainly don't want to enlarge this record by putting in the opinion of the City. I think the Mandamus Writ is proper but I don't think the brief is.

So, we object to the submission of anything but the mandamus.

I have no objection to the Petition for Mandamus being accepted.

Mr. Bickley: If it please the Court, the Petition for Mandamus and the brief in support thereof are together, and submitted together, and we ask the Court to exclude those portions that it thinks not germane. The first pages, one through nine, are the Writ of Mandamus, and beginning on page ten is the brief, which is the application.

The Chief Justice: You mean the application for it?

Mr. Bickley: Yes, sir.

The Chief Justice: You may introduce the Application for Mandamus.

Mr. Donovan: I will stipulate, Your Honor, that that [fol. 350] contains the nine pages he is referring to.

Mr. Bickley: And I do not introduce the rest of this, Your Honor.

The Chief Justice: That is agreeable!

Mr. Bickley: That is right, we do not introduce that.

The Chief Justice: As evidence?

Mr. Bickley: We do not offer it.

Mr. Donovan: Now, as to Petitioner's Exhibit Sixteen, which are the Exhibits attached to the Petition for Writ of Mandamus, I have no objection to that going in.

That is the Exhibits referred to, is that correct?

Mr. Bickley: That is correct.

The Chief Justice: Did you get the Reporter to mark them?

Mr. Bickley: Yes, Your Honor, they are marked.

Will you please mark these?

(Petitioners Exhibits No. 17 and 18 marked for identification by the reporter.)

Mr. Bickley: We offer in evidence the opinion of the Supreme Court, there having been some question as to whether or not this Court could take judicial knowledge. I [fol. 351] offer it in evidence for all purposes.

Mr. Donovan: I have no objection. I didn't raise an objection to this Court taking judicial notice of the opinion. I have no objection.

Mr. Donovan: What is that?

Mr. Bickley: That's Exhibits Seventeen and Eighteen.

Mr. Donovan: Seventeen is the opinion. What is Eighteen?

Mr. Bickley: Eighteen is the supplement to the opinion.

Mr. Donovan: Supplement to the opinion? May I see Exhibit Eighteen?

Mr. Bickley: Yes. That's the supplement to the Judgment.

Mr. Donovan: According to my reading of this, this is the original Mandamus and Order Assessing Costs. Identify it as that, I have no objection to it.

Mr. Bickley: All right.

Mr. Donovan: It's not a supplement, I don't believe. It's the Order to this Court.

Mr. Bickley: Your Honor, we would also like to intro-[fol. 352] due in evidence all of the notices served upon the parties in the Order to Show Cause in this proceeding.

It will take the Clerk some time to mark these, I am sure, and, if we can mark them at a later time—

Mr. Donovan: If the Court please, this is vital, and I will waive no rights on it. If they want to prove service, they have to prove it in accordance with the law; proof of service on the documents issued by law.

I think that is vital to this procedure. There is no service and there is no action. I think that's an element of proof that must be sustained by the Applicant here.

(Conference out of the hearing of this Reporter.)

Mr. Bickley: Mark this, please.

(Petitioners Exhibit No. 19 marked for identification by the reporter.)

The Chief Justice: You may offer it in evidence.

Mr. Donovan: Exception, please.

Mr. Bickley: We offer them properly signed by the Deputy of the Sheriff's Office showing that notice—

The Chief Justice: Each one should be separately identified [fol. 353] filed.

Mr. Bickley: Identified, yes. Your Honor, if we might, we will identify those later at recess or sometime, if that's agreeable.

The Chief Justice: Is that satisfactory, Mr. Donovan?

Mr. Donovan: I have no objection. I objected to their introduction, Your Honor.

The Chief Justice: I understand that. But I mean, later for identification.

Mr. Donovan: As far as cooperating with the Court, I am ready one hundred per cent. But I don't want to waive my rights on it.

The Chief Justice: I understand.

Mr. Bickley: If it please the Court, I would like to be sworn myself at this time to introduce evidence.

(The witness is sworn by the Clerk of the Court.)

Mr. Donovan: If the Court please, before the witness starts to testify, may I add to my previous objection as to these documents which have been produced as Exhibit Nineteen. We object to their admission herein because they are not legal process of the Court, issued in accordance with [fol. 354] Rule No. 394, and are not admissible in this proceeding because they are not legally issued.

The Chief Justice: The objection will be overruled.

Mr. Donovan: Exception.

N. ALEX BICKLEY, the witness hereinbefore named, being first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

Direct examination.

By Mr. Kucera:

Q. Mr. Bickley, you are Assistant City Attorney, are you not?

A. Yes, sir.

Q. Will you just make a statement with reference to the piece of paper that you have in your hand with reference to the notices that were sent out and explain what notices—

Mr. Donovan: If the Court please, we object to this. The best evidence as to what is sent out is the notice itself. And, as to sending out any notices, it is not proper proof in this proceeding, since service under 394 is required to [fol. 355] be made personally, and we object to any testimony relative to service in any other manner.

The Chief Justice: What do you say, Mr. Kucera?

Mr. Kucera: I want to prove by him that under orders of this Court, as directed by the Court, that a copy of the notices on the issuance of the writ of prohibition was mailed, as directed by this Court, and it assisted in the preparation of the notices under the direction of the Court and delivered them to the Clerk. And where they were mailed.

The Chief Justice: Overruled.

Mr. Donovan: Exception.

By Mr. Kucera:

Q. Will you proceed?

A. After the writ of prohibition—

Mr. Donovan: If the Court please, we object to this. We have not conceded there is a valid writ of prohibition. If he is going to talk or testify, let's see what he is talking about.

The Chief Justice: Overruled.

Mr. Donovan: Exception.

A. (continuing) —Was issued by this Court—

[fol. 356] Mr. Donovan: Object to that, Your Honor. It's a conclusion of the witness and I ask to have it stricken.

The Chief Justice: Overruled.

Mr. Donovan: Exception.

A. —Under my direction and supervision, in my office, envelopes were addressed to all of the parties on this list that I hold in my hand.

Mr. Donovan: If the Court please, we object to this as being hearsay testimony of the witness. The best evidence is the testimony of the persons who prepared and mailed anything that is admitted here.

The Chief Justice: Overruled.

Mr. Donovan: This is a criminal case, and we are entitled to absolute and direct proof.

Exception.

A. (continuing) I personally saw every one of these envelopes. I saw enclosed in each envelope a copy of the writ of prohibition—

Mr. Donovan: Same objection, Your Honor. There is no writ of prohibition before this Court, or in evidence.

The Chief Justice: Overruled.

[fol. 357] Mr. Donovan: Exception.

A. (continuing) I saw them sealed and I saw a stamp placed upon them. I checked the list against these envelopes. After the envelopes containing the writ of prohibition were stamped and sealed, they were delivered by me in boxes and under my supervision to Mr. Burt, the Clerk of the Court of Civil Appeals for the Fifth Supreme Judicial District. I had prepared these at the request of the Court and Mr. Burt because funds were not available for preparing the same by the Court of Civil Appeals. The envelopes to these addresses were delivered to Mr. Burt. The addresses were taken from the Petition filed by these parties, where available, and checked against recent telephone directory addresses, and they were delivered intact to Mr. Burt.

Q. Do you know what happened to those letters as they were addressed after you delivered them to Mr. Burt, the Clerk of this Court?

A. They were placed in the United States Mail.

Mr. Donovan: If the Court please, that calls for a hearsay answer, if ever I heard one, unless he was there with [fol. 358] Mr. Burt, and that hasn't been established.

The Chief Justice: If he knows that, it's not hearsay.

Mr. Donovan: I object to the form of the question and ask to have the answer stricken.

The Chief Justice: Overruled.

A. (continuing) I did not see them put in the Post Office. I talked to Mr. Burt and he told me what had happened.

The Chief Justice: I sustain the objection as hearsay.

OFFER IN EVIDENCE

Mr. Kucera: That's all. We would like to offer those addresses as Exhibit Number Twenty or whatever it is.

Mr. Donovan: We object to that, Your Honor, because it is not proof of anything. All we have got in the record so far, is that somebody prepared a list of names with addresses and put something in an envelope and delivered it to Mr. Burt. It isn't proof of anything.

The Chief Justice: Overruled.

Mr. Donovan: Exception. And I would like to cross-[fol. 359] examine the witness, if I may.

Mr. Bickley: Mark this, please.

(Petitioners Exhibit No. 20 marked for identification by the reporter.)

Cross examination.

By Mr. Donovan:

Q. Mr. Bickley, you state that you are an Assistant City Attorney of the City of Dallas; is that correct?

A. That is correct.

Q. And when were you appointed to that position?

A. January 1, 1958.

Q. And prior to that time did you reside in Dallas?

A. No, I did not.

Q. You came from East Texas?

A. No, sir.

Q. Where did you come from?

A. West Texas.

Q. Now, have you been counsel for the City in the Atkinson case and in the Brown case in Federal Court?

A. Yes, I have been co-counsel in it.

Q. Now, in the Brown case, was there available a Motion for Summary Judgment, which could have been made on September the 25th, 1963.

Mr. Kucera: We object, Your Honor; that's immaterial to these proceedings.

The Chief Justice: Sustained.

Mr. Donovan: Exception. May I ask the question, Your Honor, for the record, so I can show what I am overruled on?

The Chief Justice: Yes.

By Mr. Donovan:

Q: Is it a fact that under the Rules of Federal Procedure, a Motion for Summary Judgment is available to a Defendant after issue is joined?

Mr. Kucera: Object to that as immaterial. It's a question of law and speaks for itself.

The Chief Justice: Sustained.

Mr. Donovan: May I point out to the Court that this is pertinent to our defense; that this Court was without authority to issue an injunction because of the fact that there was available a legal remedy at law. And I think we are entitled to prove that.

Mr. Kucera: Your Honor, the Supreme Court of Texas [fol. 361] in all its decisions hold that a Writ of Mandamus will not be denied even though there is some other remedy. The question is an expeditious effective remedy, and this whole thing has been designed, as the record shows, for the purpose of delay. And the fact that this Court has indicated we could plead, but the Supreme Court of Texas said in its opinion that the remedy would be ineffective. And that's why a Writ of Mandamus is available.

Mr. Donovan: If the Court please, I want to prove that they had an expeditious and effective remedy, one more so than this monkey business of a writ of prohibition and mandamus. I think I am entitled to that proof.

The Chief Justice: I sustain the objection. Proceed.

Mr. Donovan: May I continue to ask my questions so I can establish a record, Your Honor?

The Chief Justice: Yes.

My Mr. Donovan:

Q. Is it a fact, Mr. Bickley, that by making a Motion in the Brown case in Federal Court on September the 24th, [fol. 362] 1962, you could have, within ten days, obtained a hearing upon your Motion on the question of res adjudicata?

Mr. Kucera: Same objection, Your Honor.

The Chief Justice: Sustained.

By Mr. Donovan:

Q. Is it a fact, Mr. Bickley, that if said Motion had been presented and ruled in your favor on the merits, that you would have then—to prosecute an appeal in the Circuit Court, had the Plaintiffs elected to seek such appeal?

Mr. Kucera: Same objection, Your Honor.

The Chief Justice: Sustained.

By Mr. Donovan:

Q. Is it a fact that such appeal could have been heard within a period of three or four months under the usual procedure in the Circuit Court?

Mr. Kucera: Same objection.

The Chief Justice: Sustained.

By Mr. Donovan:

Q. Is it a fact that if the Plaintiffs had elected to appeal an adverse decision by the Circuit Court that that appeal could have been prosecuted to the United States Supreme Court?

Mr. Kucera: Same objection.

[fol. 363] The Chief Justice: Sustained.

By Mr. Donovan:

Q. Is it also probable that such appeal, if prosecuted, could have been disposed of within a period of thirty days?

Mr. Kucera: Same objection.

The Chief Justice: Sustained.

Mr. Donovan: I ask the Court to take judicial knowledge of the facts which are included in the questions which I have asked of the witness and which I have been denied.

The Chief Justice: Well, of course, some of the procedural steps we do take judicial notice of. Others of them involve questions of law and some of them involve speculation. How long it would take to get an appeal, for instance, from the Supreme Court, and so on. We will take judicial notice of those things which are a matter of record in the procedural rules of the State Courts, and we take judicial notice—

(Conference out of hearing of this Reporter.)

We take judicial notice in the Federal Rule Procedure. Beyond that, I don't think we take judicial notice, Mr. Donovan.

[fol. 364] By Mr. Donovan:

Q. Mr. Bickley, have you ever prosecuted an appeal in Federal Court?

Mr. Kucera: Your Honor, what has that got to do with this case?

The Chief Justice: Don't ask me, make your objection.

Mr. Kucera: Objected to, because it is irrelevant.

The Chief Justice: Sustained.

By Mr. Donovan:

Q. Have you ever prosecuted an appeal before the Supreme Court for the—

Mr. Kucera: Same objection, Your Honor.

The Chief Justice: Let him finish his question.

Mr. Donovan: Let me finish my question, Mr. Kucera. I have a right to establish my questions. If they are overruled, all right.

The Chief Justice: Wait a minute, Mr. Donovan. If it appears that Mr. Kucera is to be admonished, I will admonish him.

Mr. Donovan: I apologize, Your Honor.

[fol. 365] The Chief Justice: You address your remarks to the Court.

Mr. Donovan: I apologize. I must admit, I am a little sensitive today.

The Chief Justice: We will have to preserve order. If you will finish your question—let him finish his question, Mr. Kucera.

By Mr. Donovan:

Q. Mr. Bickley, have you ever prosecuted a Federal Court case on appeal to the Fifth Circuit Court in New Orleans?

Mr. Kucera: Your Honor, the question is immaterial and irrelevant to the proceedings here.

The Chief Justice: Sustained.

By Mr. Donovan:

Q. If you have prosecuted such an appeal, Mr. Bickley, what length of time was involved before a decision was reached by the Circuit Court?

Mr. Kucera: Your Honor, the same objection.

The Chief Justice: Sustained.

By Mr. Donovan:

Q. Mr. Bickley, have you ever prosecuted an appeal from the Circuit Court in New Orleans to the Supreme Court [fol. 366] of the United States?

Mr. Kucera: Same objection, Your Honor.

The Chief Justice: Sustained.

By Mr. Donovan:

Q. If you have prosecuted such an appeal, can you tell us what length of time was involved before a decision was rendered?

Mr. Kucera: Same objection, Your Honor.

The Chief Justice: Sustained.

By Mr. Donovan:

Q. Mr. Bickley, did you have a remedy at law which would have given you a decision on the plea of res adjudicata more quickly than your action taken in seeking a writ of prohibition and a writ of original mandamus?

Mr. Kueera: Your Honor—

Mr. Donovan: Your Honor, I think I am entitled to that question.

Mr. Kueera: Your Honor, this calls for a legal matter that is wholly irrelevant to the matters before us here.

Mr. Donovan: If the Court please, this whole proceeding is based on the ground that they didn't have an expeditious legal remedy. Now, I am asking him if he did [fol. 367] have a remedy which was faster. Now, I think that is pertinent.

The Chief Justice: I think that would be speculative or a question of law, if not speculative. I don't see how Mr. Bickley could be expected to know that, which is the quicker route. I don't think anybody can predict the speed with which litigation will proceed or be concluded.

I sustain the objection.

Mr. Donovan: Your Honor—

The Chief Justice: Now, I am not consulting my colleagues in each of these objections. I urge my colleagues that if they should differ with any ruling of mine, to halt the proceedings and speak right up and let me know, and we will hold a conference.

All right.

By Mr. Donovan:

Q. Mr. Bickley, when a plea of res adjudicata has been made available to you in lawsuits in the past where you have been active as an attorney, have you sought a writ of prohibition or a writ of mandamus?

Mr. Kueera: Your Honor, that inquiry is immaterial [fol. 368] for the inquiry here and calls for a legal interpretation of what he did in private practice, and I think it has no place here.

The Chief Justice: Sustained.

Mr. Donovan: I didn't allude to private practice, Your Honor. I asked this as to his practice as City Attorney, too.

The Chief Justice: Sustained.

Mr. Donovan: ~~Exception~~.

By Mr. Donovan:

Q. Mr. Bickley, in your writ of petition for writ of prohibition, whom did you seek an injunction against.

Mr. Kucera: The papers speak for themselves, Your Honor. We see no point—he can't remember who is involved in all those lists.

The Chief Justice: Sustained.

Mr. Donovan, is it not a matter of record?

Mr. Donovan: I think so. I hope so.

The Chief Justice: There is no need to ask this witness from memory to try to repeat all of those names.

Mr. Donovan: I want to establish whether or not he [fol. 369] knows.

The Chief Justice: I sustained the objection.

Mr. Donovan: —Whether his petition is for an injunction against the homeowners, because I think that's pertinent as to what injunction was issued here, and as to the validity of this injunction.

The Chief Justice: I sustained the objection.

Mr. Donovan: Also I would like to call to the Court's attention that this proceeding is based upon an affidavit filed by Mr. Bickley. We have denied the allegations in that affidavit and I think we have a right to cross-examine him on it.

The Chief Justice: I sustain the objection.

Mr. Donovan: Note my exception.

Mr. Donovan: Will you mark this, please?

(Respondent's Exhibit No. 1 marked for identification by the reporter.)

By Mr. Donovan:

Q. Mr. Bickley, I show you Respondents' Exhibit [fol. 370] marked R-1 for identification, and ask if you

can identify that as being a Petition for writ of prohibition and ancillary mandatory orders prepared by the City Attorney's office in this proceeding.

A. Yes, that appears to be a copy of the Petition.

Q. May I call your attention to the Wherefore clause appearing on page sixteen of that petition for writ of prohibition and ancillary orders and ask if there is a description of the class against whom you seek the writ of prohibition incorporated therein.

Mr. Kucera: Your Honor, we object to the argument about that, because I take it that is the petition that was filed before this Court in which it has already served its purpose and has been rejected by the Court and it is just bringing up immaterial matters into the record.

Am I right, that it is the Petition in the Court of Civil Appeals?

The Witness: Yes, sir, this is the Petition that was filed in the Court of Civil Appeals for the writ of prohibition and ancillary mandatory orders back in October of 1962. [fol. 371] The Chief Justice: Mr. Donovan, don't we take judicial notice of that?

Mr. Donovan: Yes, Your Honor, but I want to get the witness's testimony because of the volume of material that has been poured into the files of this Court. And this is actually a part of this proceeding, this Petition.

The Chief Justice: I will overrule the objection.

Go ahead and ask him about that, or did you want to ask him about that?

By Mr. Donovan:

Q. Now, is the class which is described in here and for which a writ of prohibition is asked, described as a class of all homeowners within the approach areas of the existing and proposed runways at Love Field? Is that the class as you have described them in that Petition?

A. Well, it is more inclusive than that.

Q. Well, can you show me where it is in your Wherefore clause, that it is more inclusive?

A. The Wherefore clause states, "against yourself, James P. Donovan, individually, and as attorney, and any

[fol. 372] other agents, attorneys or representatives of the Respondents, and the Respondents individually and as a class of all home owners within the approach areas of existing and proposed runways at Love Field, and as taxpayers and all persons similarly situated."

Q. Now, that is the alleged writ of prohibition which you claim is the basis for your contempt order—now, does that describe the same class?

Mr. Kucera: Your Honor, I think this is cluttering up the record with a lot of immaterial matter. This is out of the way. We are talking about the Supreme Court Judgment, not about this.

The Chief Justice: It will speak for itself. Anyway, I will sustain the objection.

Mr. Donovan: Well, I beg to differ with Mr. Kucera as to what we are arguing about here. We are not arguing about the Supreme Court Judgment. We are arguing about the validity of writs in this action.

The Chief Justice: I understand that.

Mr. Donovan: That's why this question has been asked.

[fol. 373] The Chief Justice: I understand that.

By Mr. Donovan:

Q. Now, Mr. Bickley, did you present the writ of mandamus to the Supreme Court at Austin, the petition for writ of mandamus?

A. I assisted in presenting it, yes.

Q. I am asking you if you physically took it to Austin and gave it to the Court.

Mr. Kucera: I did that.

A. No, I think Mr. Kucera took it down personally to present it to the Court.

Q. At any rate, you were not the man who—

A. (interposing) I was not there when it was done; no.

Q. Now, in your affidavit upon which this proceeding is based, did you make this statement that this Honorable Court in Cause No. 16038, styled George S. Atkinson, et al, against the City of Dallas, by decision dated December 15, 1961, and reported in 3537 SW(2) 275, affirming the Judgment of the District Court of Dallas County, and upheld

the right and authority of the City of Dallas to build a parallel runway at Love Field and to finance the same through the issuance of revenue bonds under the authority of 1269J-5, of Vernon's Civil Statutes. Did you make that statement?

[fol. 374] A. I don't know whether that's an exact statement or not. I assume it is substantially correct, yes.

Q. Well, would you like to get the original? I am reading from it now.

A. If I had the original, I could affirm it, yes or no, Mr. Donovan. I do not have it and I did not memorize it.

Q. Well, would you like to look at the copy you mailed me? Will that satisfy you?

A. Yes, sir, if I mailed it to you, that will satisfy me.

A. Yes, I think that is correct.

Q. Now, are you able to go into the pleadings in the Atkinson case and show where anything other than a request for an injunction against the proposed issuance of bonds was asked for or determined?

Mr. Kucera: Your Honor, I think that's an immaterial inquiry. It's foreclosed, and why clutter up the record with questions like that?

The Chief Justice: The record of the pleadings in that case will speak for themselves, won't they, Mr. Donovan?

[fol. 375] We take judicial notice of them.

Mr. Donovan: Yes, Your Honor, but this man has made an affidavit here which we contend is incorrect and I have the right, I believe, to inquire into it on cross-examination, the affidavit being the basis for this contempt proceeding. I think we have a right to know from what source he gets the authority to make this statement independent of what is before the Court.

The Chief Justice: Now you asked him the question whether or not—you asked him to show in the pleadings in that case, where the prayer included certain things, didn't you?

Mr. Donovan: Well, let me withdraw the question and ask him another one.

The Chief Justice: You see, here is the thing: those pleadings are before us without being introduced in evidence, and they speak for themselves.

Mr. Donovan: That is true.

The Chief Justice: It is useless to ask Mr. Bickley what they say because they are right before us, and whether he [fol. 376] answers accurately or not, we take judicial notice of what is in the pleadings, regardless of any answer he may give.

Mr. Donovan: Your Honor, I am directing myself to his affidavit which he filed to get this Court to issue the alleged orders to show cause why we shouldn't be punished for contempt. I think in connection with that affidavit I am entitled to know whether or not he can back up the statements he has made and sworn to. It's an affidavit.

The Chief Justice: The Supreme Court of Texas has ordered us to issue this writ of prohibition, so if we should happen to agree with you, I suppose you would ask us to overrule the Supreme Court of Texas, which we can't do.

Mr. Donovan: No, Your Honor, I am not asking you to overrule the Supreme Court of Texas. I have asked that this Court set aside the Orders and give us an opportunity to come in and present our side to the Court before any orders are issued.

The Chief Justice: I sustain the objection.

[fol. 377] By Mr. Donovan:

Q. Mr. Bickley, did you prepare the process for this Court which has been issued in this proceeding since November 23, 1962?

A. Now, I do not know what you are referring to, specifically, Mr. Donovan.

Q. Well, let me be specific. Did you prepare the affidavit upon which you claim to base this contempt proceeding?

A. Yes, I prepared that.

Q. And did you prepare what you speak of as a writ of prohibition; did you prepare that?

A. Under the direction of the Court, and with the concurrence of the Court, I submitted to them a suggestion and then the Court prepared their own from that suggestion.

Q. In other words, the writ of prohibition was submitted to you by the Court?

A. By me to the Court, yes.

Q. And it was subsequently amended by the Court before issuance?

A. Yes, the Court made some changes before issuance.

Q. Now, that's on this alleged writ of prohibition that I am talking about?

A. That is correct.

[fol. 378] Q. And that was not presented to opposing counsel at any time in this proceeding, is that right?—Prior to any issuance of it?

A. Yes, opposing counsel was there when we discussed some portions that ought to go in it, Mr. Donovan; yourself and myself were in the office of Judge Dixon, and as I recall, I believe Judge Bateman was there. I do not recall whether Judge Williams was there at the time or not. You made the statement to the Court at that time that you had nothing to say because you didn't want to appear before the Court.

Q. That's right. And I was there as an observer. Is that correct?

A. That's what you stated, and the Court asked you at that time if you had any suggestions to make as to the Order that would be issued.

Q. Do you recall my answer to that question?

A. You said you had no statement to make.

Q. Did you ever serve me with notice of hearing or application to the Court?

A. I believe you were handed a copy by Chief Justice—

Q. Mr. Bickley, just a moment: I asked the question, did you serve me?

[fol. 379] A. Did I serve you?

Q. Yes. Did you ever serve me with a notice of application for a writ of prohibition?

A. No, because you admitted having been—

Q. I don't care why.

A. —Given by you in Chief Justice Dixon's office that morning when it was handed to you and said no service would be necessary.

Q. And that's the Order that you are prosecuting this contempt proceeding on; is that right?

Mr. Kucera: Yes.

A. No, it is an Order that was—

The Chief Justice: Wait just a minute. Mr. Kueera, I heard you say, "Yes" in answer to the question. Now, you are not a witness and you keep quiet.

By the Witness:

A. No, it is not that Order, Mr. Donovan. It's the Order that was amended by the Court, and then, as I understand it, given to you.

The Chief Justice: I say, "Be quiet, Mr. Kucera". I don't mean to deny you the right to make objections, you understand. I mean, do not yourself out loud answer any [fol. 380] questions which Mr. Donovan is making unless you wish to be sworn and take the witness stand.

Of course, you can speak up and make objections.

By Mr. Donovan:

Q. Did you ever give me notice of your application for reversal of the Judgment entered in here in this proceeding on October 24, 1962, and the rehearing denied on November 23, 1962? Did you ever serve me with notice of any application of this Court for that purpose?

A. For the Motion for Rehearing you are talking about?

Q. Let me restate the question.

A. Would you restate the question, I didn't understand you, Mr. Donovan.

Q. Did you ever serve me with notice of any application being made to this Court in behalf of the City of Dallas to set aside the Judgment of this Court entered on October the 24th, 1962, rehearing denied November 23, 1962?

A. I did not, because I did not consider it necessary. The Supreme Court had already entered the Order as to what was to be done, and I assumed that you had a copy of the [fol. 381] Supreme Court Judgment.

Q. But the Order of the Supreme Court was not a continuation or part of this proceeding in any way, was it?

A. Yes, it was necessarily a part of the proceedings.

Q. Don't the Statutes of Texas prohibit an appeal and make the Judgment on writ of prohibition by Civil Appeals a Final Judgment?

Mr. Kucera: Your Honor, we will object, that is immaterial and irrelevant here.

The Chief Justice: Sustained.

Mr. Donovan: I think, Your Honor, we are entitled to this.

The Chief Justice: Mr. Donovan, your question is a matter of law. It doesn't make any difference what Mr. Bickley might answer. You have asked a question of law, whether or not a certain Judgment is final. That's a pure question of law.

By Mr. Donovan:

Q. Well, was the proceeding in the Supreme Court of Texas a mandamus proceeding?

A. Yes, it was a mandamus proceeding.

[fol. 382] Q. And the one before this Court was a writ of prohibition?

A. Yes, that is correct.

Q. Now, whatever notices you were referring to in this list that you have got in evidence here, was there a seal of the Court on anything that was sent out, to your knowledge?

A. There was no seal of the Court. There was a signature of the Chief Justice of the Court for the Court.

Q. Was there any attestation of the Clerk as to the validity of the paper which you say you mailed or delivered to Mr. Burt?

A. There was no attestation to it. It was signed as Judgments of the Court.

Q. In other words, you had the signature of The Chief Justice duplicated on a notice which was sent out?

A. For the Court, yes, sir.

Q. Mr. Bickley, as City Attorney—Assistant City Attorney, you and the City Attorney are limited by charter to representation of the City in lawsuits and proceedings; is that right?

A. Yes, that is correct. We represent the City of Dallas. [fol. 383] Q. Now, do you have any authorization from the Mayor and Council of the City of Dallas since April the 1st, 1963, authorizing you as attorney to file charges against the eighty-five people before this Court to obtain

a writ of prohibition against them and to prosecute them for contempt?

Mr. Kucera: Your Honor, we will object to that as being immaterial. The duties of the City Attorneys are prescribed by law.

The Chief Justice: Sustained.

Mr. Donovan: If the Court please, I would like to be heard on that point.

The Chief Justice: Very well.

Mr. Donovan: The City Charter says the City Attorney can represent the City in all proceedings.

We do not assume that that gives the City Attorney carte blanche to start proceedings against anybody that the City Attorney chooses to sue.

Our position is, and we have pleaded it, that this action for prohibition and this action for contempt cannot be commenced by the City Attorney on his own without authorization from the Council of the City of Dallas, approved by official resolution.

I do not believe that the Council of the City of Dallas will vote to put citizens in jail.

I think we are entitled to know who we are being prosecuted by, whether it's the City Attorney's office, or whether it's the City Attorney's office acting with the authority of the City.

If that be not the rule, there would be nothing to keep Mr. Kucera or Mr. Bickley from suing anybody they don't like at the City's expense.

In the past, I know the City has by resolution authorized certain actions when actions were to be taken.

I read the other night where they spent one hundred and twenty-one thousand dollars in prosecution of this suit and other suits in the CAB hearings in the last two years.

I think we are entitled to have proof of authority here and we pleaded as a defense that they are not authorized to bring this contempt proceeding and I think until that [fol. 385] authority is shown, then this proceeding is a nullity and should be dismissed.

Mr. Kucera: Your Honor, this litigation started at their instance in the Atkinson case.

It's the duty of the City Attorney under the Charter to represent the City and if I had not, I would have been derelict in my duties and until such time as the lawsuit is over, the authority is there to prosecute it to a final conclusion, and when the Court says I have lost, I will quit, instead of doing like what these people are doing here.

It's our function and our responsibility to give full face and credit and effect to Judgment which this Court had held we were entitled to, and I have never heard of anyone questioning the right of an attorney every time he wants to move around over here, what he should do.

By that same token, if I might argue, that in the course of this trial I should go and call the City Council as to whether I should object or not, I think it's plainly ridiculous, Your Honor.

[fol. 386] Mr. Donovan: That is the most common word in this lawsuit as thrown at the counsel for the Respondents and the people. Everything is ridiculous.

I want to say this to the Court; that as of April the 7th, this year, there was a change of Council in the City of Dallas. There was some question at that time as to whether or not the City Attorney would be again appointed.

Now, there is no continuing authority for taking off and watching attacks against citizens that I know of in the City Charter.

There is no resolution that I know of on record that authorizes this extraordinary proceeding before this Court.

I think we are entitled to have that resolution presented here, if there be one, and if there isn't one, then I think this action should be dismissed as being an action by the City Attorney and not by the Mayor and Council of the City of Dallas.

I think these people here as Defendants in a quasi criminal action are entitled to know who is the prosecutor, [fol. 387] whether it's the City of Dallas, the Council, or whether it's these two attorneys that are anxious to win a lawsuit which they don't want to try.

So, we respectfully request this Court to either order production of their authority to prosecute this action, not as of today, but as of back when these charges were filed.

If that authority is not forthcoming, then we ask that this proceeding be dismissed.

The Chief Justice: Overruled.

Mr. Donovan: Exception.

By Mr. Donovan:

Q. Do you have on record a resolution by council of the City of Dallas since April 1, 1963, that authorizes prosecution of this proceeding?

Mr. Kucera: Your Honor, it is wholly immaterial. The Court has ordered disposal of this matter. It is a deliberate attempt on the part of the counsel to prolong and bring in immaterial matters that this Court has passed on, and I respectfully request that counsel be ordered to do so.

Mr. Donovan: If the Court please, I am trying to make my record, and I think I have a right to do so. I can ask [fol. 388] the questions. I might not get the answers, but I have the right to ask.

The Chief Justice: I sustain the objection.

Mr. Donovan: Well, in other words, am I instructed not to ask any other questions on this point?

The Chief Justice: No, I didn't mean to go quite that far. You may ask the questions, and if Mr. Kucera gives his objections, I will rule on each question separately.

Mr. Donovan: I understand the objection to that question I have just asked was sustained?

The Chief Justice: Yes, in part, so far as the question itself is concerned.

By Mr. Donovan:

Q. Mr. Bickley, is there anywhere in the records of the City of Dallas to your knowledge, a resolution authorizing you or Mr. Kucera to prosecute the eighty-five Respondents named in this proceeding today for contempt of court?

Mr. Kucera: Your Honor, I think it is immaterial whether there is or isn't, and it's just prolonging this [fol. 389] hearing unnecessarily, and therefore, I object to the question.

The Chief Justice: Sustained.

Mr. Donovan: Note our exception, Your Honor.

By Mr. Donovan:

Q. Mr. Bickley, is there anywhere in the City Records in any place, any resolution or ordinance or anything authorizing the City Attorneys of the City of Dallas to seek a writ of mandamus in an original mandamus proceeding from the Supreme Court of Texas?

Mr. Kucera: Your Honor, the same objection.

The Chief Justice: Sustained.

By Mr. Donovan:

Q. Mr. Bickley, is it a fact that you contacted Judge Hughes prior to the filing of the action of Donovan against the Supreme Court relative to such action, or action in the Federal Court?

A. Yes, I talked to Judge Hughes and told her that I would like to be present, although I was not a party, at the time that she heard that—

Mr. Kucera: May I clarify this. The question was if you talked to Judge Hughes before this suit was ever filed.

[fol. 390] The Witness: Not before suit was ever filed, no. After the suit was filed.

By Mr. Donovan:

Q. Well, were you waiting in the Federal Courthouse on the day this suit was filed, Donovan against the Supreme Court?

A. No, sir.

Q. Had you contacted anybody in the Clerk's office prior to that time?

A. Prior to the filing of the suit?

Q. Yes.

A. No, sir.

Q. Do you know any reason why the Clerk refused to file the suit until she contacted someone else?

A. I do not know that to be a fact.

Q. Well, had anybody else from the City Office contacted the Federal Court prior to the filing of the suit, to your knowledge?

A. Not that I know, but for your knowledge, Mr. Donovan, we checked with the Clerk over there very regularly since the filing of these lawsuits because we do not get copies of the papers and we have to check to see what is filed and when.

Q. Now, you were not a party to the Supreme Court of Texas action, were you?

[fol. 391] A. No, I was not.

Q. You had no business in that suit?

A. I think I did have.

Q. I am speaking as a matter of law. You weren't representing anybody in that suit, were you?

A. I represented no one in that suit, no, except as inferentially affected the lawsuits filed against the City of Dallas, and in that respect, I was interested.

Q. But you were not a representative of any party to that suit?

A. Not of any party to that suit, no.

Q. And yet you did go to the Federal Judge and ask to be heard on the application for a temporary restraining order; is that right.

A. Not to be heard, no. But to be present.

Q. And you went to the Judge's office to ask that permission?

A. Yes, I did.

Q. And that was in the absence of opposing counsel?

A. Yes, that's right.

Q. In this action?

A. In this action.

[fol. 392] Q. It was also in the absence of the opposing counsel in the other action?

A. That I made that request?

Q. Yes.

A. Yes, it was in the absence of opposing counsel.

Q. And you made no request of me to be advised as to what I was going to do, did you?

A. You had already told me I was not even entitled to have a copy of the Petition, since I was not a party. You told me that in the hall at the Courthouse.

Q. Was I right—

The Chief Justice: Pardon me just a minute, gentlemen. I fail to see the materiality of this, what happened down in Federal Court.

Mr. Donovan: Judge, as part of the proof of argument—

The Chief Justice: Wait just a minute, Mr. Donovan, until I finish.

Mr. Donovan: I thought you were finished, Your Honor. I apologize.

The Chief Justice: I say, I fail to see the materiality of [fol. 393] it. I think that suit has been dismissed by the Federal Court, has it not?

Mr. Donovan: Yes, and it probably will be appealed.

The Chief Justice: It having been dismissed, I don't see the materiality of the matters you are inquiring about, but if they are material, I want to let you inquire about them.

Mr. Donovan: Well—

The Chief Justice: But until you show me they are, I don't want to waste time here. I want to give you and your clients all the time that you need to present material facts concerning this contempt hearing.

But, whatever happened down at Federal Court and whatever Judge Hughes did, I fail to see how it can have any bearing on this contempt.

Go ahead, now, and explain.

Mr. Donovan: Your Honor, I consider it material for this reason: as this Court knows, and as I have stated many times, the City won't come into Court and try its lawsuits.

[fol. 394] Now, when we went before Judge Hughes, Mr. Bickley was there and I was there and at that time the Judge suggested to me that I not say anything and permit her to enter an Order dismissing our suit because of this injunction.

As I stated to the Court this morning, everything that we have done since October 24, 1962, has been in an effort to sustain the Judgment originally granted by this Court.

Now, I think it's material on the question of whether we were being contentious of this Court or whether we were trying to defend this Court's Judgment.

We do not consider this last Order, which the Court under compulsion, in the free exercise of this Court's Judgment—every step we have taken has been to prevent the restriction of this Court's free judgment and to establish the old Judgment.

For that reason, I think that what took place up there in Federal Court and the proposals that were made are relevant material to this action as part of our defense.

The Chief Justice: Of course, it wasn't illegal for Mr. Bickley to be there.

[fol. 395] I expect there are some people in this Court-room today that are not parties to this lawsuit. A hearing in court is not a closed session to everybody except the litigants.

If Mr. Bickley was present and asked to be permitted to be present, there is nothing illegal about that.

Mr. Donovan: Well, this was an in chambers hearing, Your Honor, not a public court hearing.

If I understand the rule, and perhaps my ethics are wrong, but I understand the lawyer is not to contact the Court in the absence of opposing counsel.

The Chief Justice: There are certain circumstances when that is true. But I don't know of any grounds on which a person not a litigant to dare not ask to be permitted to be present at a hearing.

As a matter of fact, I had a person ask me, "Could I attend this hearing today". I said, "You can if there is room".

There is nothing illegal about somebody attending a hearing just because they are not parties to it.

[fol. 396] **Mr. Donovan:** Of course, my next question, Your Honor, is addressed as to whether or not he didn't discuss the case and urge the Court against the restraining order.

The Chief Justice: Well, if you are going to make charges against Judge Hughes and the Federal Court, this is no place to lodge that complaint, if she was guilty of improper conduct, which I don't say she was.

Mr. Donovan: I have that case on appeal, Your Honor.

The Chief Justice: If Judge Hughes was guilty of improper conduct, there is a way to get that, but not at this hearing.

Mr. Donovan: I called it to her attention that morning, Your Honor. But I wanted to show the pressure that we had been under, and I think we are entitled to show—

The Chief Justice: I guess everybody has been under pressure in this case.

Well, objection has been made but I just wanted to say —so I will cut short my remarks.

Mr. Donovan: I will waive the question, Your Honor. [fol. 397] The Chief Justice: I don't see any materiality into going into all of the Federal Court procedure. If Judge Hughes didn't act properly, we can't do anything about it.

Mr. Donovan: I just called to the Court's attention that the hearing, the public court hearing, has been offered in evidence and is in evidence. It has been offered by the Petitioners. I will waive further questions on that point.

The Chief Justice: I don't want you to do that. I think they are a matter of record. I certainly don't want you to give up any of your rights, Mr. Donovan, and I am not trying to do that. I am just trying to channel testimony into designs of materiality.

You go ahead and continue your questions, but please try to let them be aimed toward this contempt hearing.

All right, go ahead.

By Mr. Donovan:

Q. Mr. Bickley, in any proceeding that I have appeared in since April 1, 1963, have you ever heard me say one word in disrespect of this Court?

Mr. Kucera: Your Honor, that has nothing on the bearing [fol. 398] of this issue here, whatsoever. He is not being charged with that in this proceeding and it is immaterial.

The Chief Justice: Sustained. Go ahead, please.

Mr. Donovan: Your Honor, please. He says I am not being charged with disrespect to the Court. I don't know what a charge of contempt is.

The Chief Justice: Well, I understood your question to be whether you had said anything.

Mr. Donovan: That's right. This man is the man that said the affidavit and said I am contemptuous of this Court and I want to know whether he has ever seen me or heard me—

The Chief Justice: You can commit actual contempt by acts, not words. I don't know that you have ever called us any harsh names. I don't know whether you ever have or not.

Mr. Donovan: On the contrary, Your Honor—

The Chief Justice: It doesn't make any difference [fol. 399] whether you have or not. The contempt we are here about is this: continuing the litigation after we issued a writ of prohibition. Now you may have run off in a corner and used some ugly words, but that is not the reason we are here today. We are here today about whether or not you have continued this litigation after we ordered you to proceed no further. That's what the hearing is about today.

Mr. Donovan: Well, there is no question but what I have continued litigation, but I have continued it not in a contemptuous—for contemptuous reasons.

The Chief Justice: The question is, after the issuance of the writ of prohibition, did you, nevertheless, with that knowledge, go ahead and continue litigation, which you may have said to somebody—we don't care—I have been called harder names than, probably than you could have used.

Mr. Donovan: If the Court please, I refer the Court to my statement that is already into evidence as to what I said about this Court.

[fol. 400] I have sustained this Court in the highest opinion, but I do say this, Your Honor: that as part of our defense, we are contending that this Order was illegally issued and is invalid.

The Chief Justice: I am aware of that.

Mr. Donovan: Now, in support of that, as I visualize the contempt there, is a question as to the manner in which action is taken, which is pertinent.

I mean, if action is taken in good faith and without disrespect to the Court, I think the cases hold that that

could even purge the whole contempt. Now, that's a Supreme Court decision.

The Chief Justice: Well, I am not aware that you can defy a Court and say, "I meant it in good faith, I meant it".

Mr. Donovan: No, Your Honor, but we have a right to disregard, and I understand the duty of a lawyer is to disregard an Order which we believe to be invalid.

The Chief Justice: You do that at your own risk.

[fol. 401] Mr. Donovan: That's right.

The Chief Justice: The fact that you acted in good faith will not purge you of contempt.

Mr. Donovan: Well, there is a Supreme Court case which says that action taken in good faith in most circumstances is sufficient to purge contempt, which I would be glad to give to the Court, if the Court would like the citation.

The Chief Justice: Go ahead with your questioning.

Mr. Donovan: Well, I understand the last question—the objection was sustained to it!

The Chief Justice: That's right.

Mr. Donovan: I pass the witness.

Mr. Kucera: That's all.

[fol. 402] Mr. Bickley: Mr. Burt, please.

(Witness is sworn in by The Chief Justice at this point.)

JUSTIN G. BURT, the witness hereinbefore named, being first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

Direct examination.

By Mr. Bickley:

Q. Will you state your name, please sir?

A. Justin G. Burt.

Q. And what position do you hold, Mr. Burt?

A. Clerk of the Court of Civil Appeals, Fifth Supreme Judicial District.

Q. How long have you held that position?

A. Well, thirty six years.

Q. And in your position as clerk of the court, did you receive from my office the envelopes addressed to the parties as shown on this list, in particular Exhibit No. 20?

A. I did.

Q. And what did you do with those envelopes?

A. They were placed in the United States mails.

[fol. 403] Q. Did you receive a return on any of those envelopes?

A. I did not.

Q. Did they have your return address on them?

A. That's my recollection.

Mr. Bickley: No further questions.

Cross examination.

By Mr. Donovan:

Q. Mr. Burt, did you open those envelopes after they were delivered to you by Mr. Bickley?

A. No sir.

Q. So you have no idea as to what was in the envelopes?

A. I saw one or two of them.

Q. After they were sealed and delivered to you?

A. No, one or two was left unsealed.

Q. But in the sealed ones that you mailed, you didn't open those to see what was in them?

A. No sir.

Mr. Donovan: Pass the witness.

Mr. Bickley: No further questions.

Mr. Bickley: If it please the Court, I think the first group that we have been talking about, that that completes our testimony on that group.

PRESENTATION OF FURTHER EVIDENCE

The Chief Justice: Do you wish to continue with your evidence as to the second and third groups?

Mr. Bickley: Yes, we shall, if the Court desires it that way.

The Chief Justice: All right. Is that agreeable, Mr. Donovan?

Mr. Donovan: It's agreeable.

The Chief Justice: All right.

Mr. Bickley: The Group No. 2, that is listed by Mr. Donovan on his list, we will take as a group and present collective evidence as against all of them individually, Your Honor.

The Chief Justice: Now the stipulation you have here covers as to the second group also, Mr. Donovan?

Mr. Donovan: Yes, Your Honor, as to the evidence offered, of course subject to any objections we have made.

The Chief Justice: That stipulation is agreed to?

Mr. Bickley: That is correct.

The Chief Justice: Very well, proceed.

[fol. 405] Mr. Bickley: As to this group, we have, Arvil Jarman; Mary Jarman; Dorothy Boland; Dr. Grant Boland; Jack H. Broom; Jane Broom; C. D. Crudgington; Hriet E. Crudgington—

Mr. Donovan: I beg your pardon, but I understand she has not been served.

Mr. Bickley: She has not been served. That is correct.

The Chief Justice: Let me mark that please. This is class two and she is not on the list?

Mr. Bickley: She is not on the list. She has not been served, Your Honor. He is correct.

The Chief Justice: All right. Mr. Crudgington has been served, is that right?

Mr. Bickley: Mr. Crudgington has been, but Mrs. Crudgington has not.

The Chief Justice: All right.

Mr. Bickley: (continuing) James P. Donovan; Mary R. Gore; Juanita Isom; Browning Lotridge; George B. Lotridge; Lillian Lowrie; J. D. Lowrie, Jr.; Lometta McDonald; Dorothy Lusk Myrick; S. A. Myrick; Lewis A. Park; Lola E. Park; Anna Marie Pylant; Calvin Pylant; E. W.

[fol. 406] Quinton; Geneva Quinton; Faye Richardson; Arthur G. Rudkin; Helen Rudkin. And I think that completes that group.

As to that group, Your Honor, in addition to the general matters, and we insist that they be considered against this group, as well as all the groups, and by general matters that refer to the proceedings before The Supreme Court

of the United States, the notices that have been issued, and the general pleadings in the suits.

We would specifically introduce the petition in the Donovan case versus the Supreme Court and this Court, which is our Exhibit Number 4, and which is the charge lodged against these people for having filed that suit after the entry of the writ of prohibition in this case.

And conditionally, and for the limited purpose of showing their continued intent, we introduce in evidence our Exhibit Number 8, which is the motion in that same case to add and drop parties; our Exhibit Number 9, which is the plaintiff's answer in that particular suit; our Exhibits Nos. 10 and 11, which are transcripts of proceedings on May 9th and May 16th, in that particular suit.

[fol. 407] And we think that completes the evidence as to this group of respondents, Your Honor.

Then as to the next group, which Mr. Donovan lists as being Class No. 3, and consisting of the following people: William G. Byars; Mrs. L. A. Danek; Mrs. Arlene E. Davis.

And listed in that group, we also have Audrey M. Karr, which we list in another group for the reason that she was also a plaintiff in the injunction suit, and the other parties were not. She was one of the original plaintiffs in the injunction suit and these other parties were not. So we list her in another group.

(Conference held out of hearing of this reporter.)

Mr. Bickley: After conference with counsel, we will put her in another class, and submit different evidence. Is that agreeable?

Mr. Donovan: That is agreeable.

The Chief Justice: Which class are you putting her in?

Mr. Bickley: We will give another class later on, Your Honor, in which we will list her name.

The Chief Justice: All right.

[fol. 408] Mr. Bickley: (continuing) Donald S. Reckrey; Caroline Rogers, and Russell G. Rogers.

And as to these parties, in addition to the general items, as we have introduced, and notices, the proceedings in the

courts, and the other general items, we introduce specifically our Exhibits Number 1, which is the motion to add parties and drop parties in the case of Brown versus the City of Dallas, No. 9276, in the U. S. District Court, in which these parties were listed as being parties that desired to join in as plaintiffs in that lawsuit, after the writ of prohibition has been issued out of this court.

We introduce in evidence our Petitioners Exhibit Number 2, which is the plaintiff's answer in that law suit, in which they contested the suit.

We also introduce in evidence our Exhibit No. 3, which is a transcript of the proceedings, and in which Mr. Donovan made the statement on a question from the Court that these parties had been advised about the writ of prohibition and that they did have knowledge of it, and that he had told them they might be in contempt of court in filing that lawsuit, and that they, in writing, had requested to be [fol. 409] made parties to the lawsuit.

Then, for the limited purpose of showing intent, and continued intent, we introduce in evidence our Exhibit No. 5, which is a Notice of Appeal by Mr. Donovan on their behalf.

Our Exhibit Number 6, which is the bond for the appeal, and our Exhibit Number 7, which is the order of the court in that case dismissing the lawsuit.

At that particular time these parties were not involved in the case of Donovan versus The Supreme Court and this Court.

Mr. Donovan: Your Honor, we object to these exhibits against this last class, because they are not parties to this proceeding, the original proceedings, nor were they parties in The Supreme Court action. And I don't believe this list — I haven't seen it, but on the list that Mr. Bickley submitted, I don't think their names are on there. I am not sure.

The Chief Justice: Overruled.

Mr. Donovan: Exception.

Mr. Bickley: Then as to the next class, which we state as a specific class—

The Court: That will be a fourth class?

[fol. 410] Mr. Bickley: Yes, sir, it will be a fourth class, and picking up those parties that we took out of some of the other classes.

We list the name of Audrey M. Karr. Husband was not served, and therefore he is not before the Court.

And in addition to the general items and exhibits that have been introduced, we introduce specifically in this class, our Exhibit Number 1, which is the request to add and drop parties in the case of Brown versus City of Dallas, in the U. S. District Court, in which her name is listed as one who desires to be added.

Our Exhibit Number 2, which is the plaintiff's answer in that particular suit, and shows the intent, and that they did continue to prosecute it.

Our Exhibit Number 3, which is a transcript of that Brown versus City of Dallas, Cause No. 9276, in which Mr. Donovan stated that this party, as well as the others mentioned a while ago, had been given notice of the writ of prohibition.

Our Exhibit Number 4, which is the petition in the case of Donovan versus The Supreme Court and this Court, in [fol. 411] which Mrs. Karr was a party plaintiff, subsequent to the issuance of the writ of prohibition.

And then for the limited purpose of showing her intent to continue to prosecute and violate the orders of this court, we introduce our Exhibit Number 5, which is the notice of appeal in the Brown case, filed by her attorney, Mr. Donovan, for her and others.

Our Exhibit Number 6, which is the bond for the appeal in that case, and our Exhibit Number 7, which is the order of the Court dismissing that cause.

And in addition thereto, for the same limited purpose, our Exhibit Number 8, wherein parties were added and dropped to the suit of Donovan versus The Supreme Court and the Court of Civil Appeals, in which her name did not appear since she was already a party.

And Exhibit Number 9, which was the answer for the plaintiffs in that cause.

Exhibits numbers 10 and 11 which are transcripts of what occurred before the Court in those two causes on May 9th, and May 16th.

Then as to the final class, which we would call Class Number [fol. 412] 5, and which consists of the following persons that are not listed in the other classes, but were taken out.

We list the names of Patricia P. Dukelow; Emily F. Slaughter; Lee R. Slaughter and Alberta M. Turrell.

In addition to the general matters introduced as against all of the respondents, and against this particular class as such, and the individuals therein, we introduce in evidence the following items: Our Exhibit Number 12, which is the petition in the case of Brown versus City of Dallas, in which their names are listed.

Our Exhibit Number 1, which is the motion to drop and add parties in Brown versus City of Dallas, in which they did not ask that their name be dropped.

Our Exhibit Number 2, which is the answer of the plaintiffs in the case of Brown versus City of Dallas, and shows the prosecution of the same, and our Exhibit Number 3, which is the transcript that occurred on May 2, 1963 in the case of Brown versus City of Dallas.

And for the limited purpose of showing their intent to continue to prosecute these causes, and this one Brown [fol. 413] versus City of Dallas case. They are not parties in the other case.

We introduce in evidence our Exhibit Number 5, which is the notice of appeal; our Exhibit Number 6, which is the bond in the Brown case, and our Exhibit Number 7, which is the order dismissing the Brown suit.

And this completes the evidence as against this particular group.

I would add one additional thing as to the group Number 3, as listed by Mr. Donovan. And that is our Exhibits Nos. 8, 9, 10 and 11, which show the proceedings in the case of Donovan versus The Supreme Court and the Court of Civil Appeals, wherein these parties, although they were not parties at the time the motion for contempt was filed in that lawsuit. They came in later, with the notice of the writ of prohibition and asked that they be made parties, and according to Mr. Donovan's statement to the court, in

writing, requested that they be made parties, in spite of the knowledge given to them by him of the writ of prohibition.

Mr. Donovan: I would like to state to the court that that statement Mr. Bickley keeps repeating is that they were advised that the opinion of counsel was that these orders [fol. 414] were invalid; were not valid. And I think that's pertinent here.

I will be glad to testify to it when it comes time.

The Chief Justice: Isn't it in one of these proceedings that is in evidence?

Mr. Bickley: It's in all three of them in evidence, Your Honor.

Mr. Donovan: Your Honor, what is in the proceeding is the question by Mr. Bickley "you suddenly became worried about the welfare of these people", and he said he would not object to their joining, if counsel would assure the court they had been advised. And I told the court that I did have written authority to represent them, and that I had advised them of the danger of fine and imprisonment, and I will supplement that.

Mr. Bickley: We will not burden the Court with reading it now, but it appears in the transcript on May 2nd before Judge Hughes.

The Chief Justice: That is in evidence; the transcript?

Mr. Bickley: Yes, it is in evidence.

Mr. Kucera: May I have a conference?

The Chief Justice: Yes, you may have a conference.

[fol. 415] (Conference was had between Mr. Bickley and Mr. Kucera out of hearing of reporter.)

Mr. Bickley: If it please the Court, we would, on the basis of representations made here, we would ask Mr. Atkinson to take the witness stand.

The Chief Justice: Is Mr. Atkinson here? Mr. Atkinson, you understand you don't have to testify; you cannot be required to testify.

Mr. Atkinson: If the court please, I am taking my lawyers advice on this.

Mr. Donovan: I recommend that Mr. Atkinson not testify, and avail himself of his privileges under the constitution.

Mr. Atkinson: I follow Mr. Donovan's advice.

The Chief Justice: Well, Mr. Atkinson desires to exercise his rights under our constitution, and declines to testify.

Mr. Bickley: We understand that this same thing goes as to all of the other respondents?

For the purpose of the record, Your Honor, we are asking counsel.

The Chief Justice: You may call all of them if you wish. [fol. 416] Mr. Donovan: As of this moment, Your Honor, I will state for the record that I shall advise all my clients not to testify, and I am sure they will avail themselves of the privilege not to testify, as provided for in the constitution of the United States and Texas.

The Chief Justice: Mr. Donovan has, in open court, advised his clients not to testify. I am sure Mr. Donovan is authorized to give that advice. However, I think that if any of you care to override his advice, you have a right to appear if you want to.

I am not advising you to, or suggesting you do so. You have an attorney, and I want to respect your right to refuse to testify. But I also want to respect your right to testify if you insist, over Mr. Donovan's objection, though he is your attorney.

Do any of you wish to testify?

(No response.)

The Chief Justice: I take it then, and the record will show that everyone here was given an opportunity to testify. And they were also notified that they didn't have to testify; not required to.

[fol. 417] Mr. Kucera: Your Honor, may the record also show that the City of Dallas was ready and present in Court, and everyone of these parties that was cited for contempt to testify, upon advice of counsel they have refused to do so. And also was given an opportunity individually to select whether they wanted to follow the advice of counsel, and they declined to take the stand.

The Chief Justice: I think the record so shows. Is that true, Mr. Donovan?

Mr. Donovan: Yes, Your Honor, except the one thing that I said, that as of this moment that is my advice. I reserve the right as the proceeding goes forward to change that advice if it becomes proper.

The Chief Justice: Very well.

Mr. Donovan: But as of now, that is my recommendation, and the record may show that.

The Chief Justice: Very well. Is there anything else to come before us?

Mr. Bickley: The petitioner rests at this point.

The Chief Justice: Well, suppose before we start in—do you wish to present some evidence, Mr. Donovan?

[fol. 418] Mr. Donovan: Your Honor, I would like a few minutes with my clients.

The Chief Justice: I was just going to say we would take a recess at this time, say a ten minute recess, or something like that.

(Ten minute recess was had.)

The Chief Justice: Let's have order. Be seated. We have one or two matters to take up here. Earlier in the day we took under advisement objections made by Mr. Donovan to the admissibility of certain evidence of acts which took place after our notice to appear and show cause why they were not in contempt was issued by us.

Mr. Bickley offered that evidence for the limited purpose of showing the continuing intent of the parties to disobey the Court Order, the Writ of Prohibition, and to persist in prosecuting the litigation. It was offered for that limited purpose only.

We have given the matter some study and have concluded it is admissible for that limited purpose only, and it will be admitted for that purpose.

It will be understood, of course, that the parties are not [fol. 419] today being tried in contempt for acts which were committed after the notice of contempt was issued by us.

It will be admitted, however, for the limited purpose. Let the record so show.

Did you have something to say, Mr. Kucera?

Mr. Kucera: Yes, Your Honor. I regret I spoke when I should have been quiet. It was a suggestion I made to my assistant. I wish to apologize for that statement.

The Chief Justice: Very well, Mr. Kucera, we accept your apology.

Of course it is true that in hearings such as this, feelings run a little high and there is a high emotional content to the atmosphere, I guess, and it is rather understandable that sometimes people might do or say something a little bit out of turn. So we won't be vindictive about it, Mr. Kucera. We accept your apology.

Very well. Proceed now, Mr. Donovan.

MOTION TO DISMISS AND RULING THEREON

Mr. Donovan: At this time, Your Honor, I want to move to dismiss the charges on the ground that the City of Dallas has failed to sustain its burden of proof as to charges made against all three classes; has failed to prove [fol. 420] that any order was served on any person involved herein; has failed to prove that there was any legal order of the court ever issued affecting these persons; has failed to establish beyond a reasonable doubt, or even by a preponderance of the evidence, that any of these people have been contemptuous of this Court at any time.

They have submitted in the Brown case, in the Federal Court, a record which demonstrates and placed on record their utmost respect for this Court.

As to charge (a) under Class 1, failing to request the United States District Court to dismiss Cause No. 9276, Daniel C. Brown vs. City of Dallas, I know of no order of this Court that commanded anybody to request the United States District Court to dismiss that Cause.

As to (b) in that charge, contesting the dismissal of the cause of Daniel C. Brown, pending in the United States District Court, I don't believe that this Court has any jurisdiction to control the action of a person in Federal Court, under its rights, which has been our position all the way through.

Now as to the Donovan case, Cause No. CA-3-63-120, [fol. 421] Civil, in the United States District Court, there

is nothing in any order that I know of, any legal order of this Court that said we couldn't test this Court's order, or the Supreme Court order, in any manner.

I think the direct attack on any order on the basis of its validity cannot constitute a contempt of that order, any more than if we appeal to the United States Supreme Court from a decision of this, or the Supreme Court, would be contempt.

In other words, we feel that Cause No. CA-3-63-120 cannot form the basis of the contempt charge in that there is a direct attack upon the validity of the orders allegedly issued by this Court.

For these reasons, we respectfully request that all of these charges be dismissed.

Now as to the other persons who are charged with contempt, even though they specifically withdrew their names from the two Federal actions, which are alleged to be contemptuous, I don't think there is any contempt on those people since their dismissal, which has been put into evidence, and their withdrawal, which is in evidence. All of them at the first opportunity when they could go to Court [fol. 422] and seek withdrawal, did so. It is true that some of those people appeared in the case against the Supreme Court. But when they were given the opportunity and advised as to the nature of what was being claimed, and what possible consequences there might be, those people asked to be withdrawn and they have been withdrawn. There is no argument about it.

As to the other group, which involves those who joined in the actions subsequent to the alleged order of prohibition, that group was not a party to this proceeding, and they have not been parties to the mandamus proceeding, they were not in the Atkinson case, and so far as I know, no process has ever been served on them until this order to show cause was served on them. So I don't see how they can be held to be contemptuous of this Court in any way.

But as to all the classes involved, our contention is that the City has not sustained the burden of proof, which rests upon it. And until that burden is sustained, why then the charges should be dismissed.

In that connection, I believe the Court should take into consideration that there is no valid process, and no proof [fol. 423] of any valid process ever having been issued or served by this Court, under the rules controlling the Court. There is nothing in evidence to show that that process exists, or that it was served. There is nothing in evidence to show that orders were served in accordance with the rule.

And until those things in this type of proceeding are proven, which are quasi criminal, or criminal according to some Courts, then of course the parties defendant cannot be convicted.

On those grounds, and the ground that the actions of this court is an illegal interference with the rights of these parties to seek protection of their rights in the Federal Court, and that any orders issued in that vein, or with that intent to restrict prosecution of Federal rights in Federal Courts, is illegal and unconstitutional under the constitution of the United States, and the statutes of the United States, and therefore such orders would not be valid.

For those reasons we request that the proceedings as to all of the classes be dismissed, Your Honor.

The Chief Justice: The motion will be overruled.
[fol. 424] Mr. Donovan: If the Court please, I would like to make one statement in behalf of all my clients, of all persons whom I represent, and if necessary I will be sworn and make a statement.

The Chief Justice: If you wish it as evidence, you may be sworn, but if you just wish to make a statement, you have a right to make a statement.

Mr. Donovan: Your Honor, I believe I should give it the weight of evidence, and that's what I want it to be.

(Witness is sworn by Clerk of the Court.)

JAMES P. DONOVAN, the witness hereinbefore named, being first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

Mr. Donovan: I wish to state to this Court that insofar as each of the persons whom I represent before this Court today are concerned, that in connection with all proceedings taken, I advised those people that in my opinion there was no valid order of this Court prohibiting them from taking [fol. 425] the action which was taken.

I also advised those people that it was my opinion that their rights were being violated to denial of access to the Federal jurisdiction.

I wish this Court to understand that the actions taken here by me, with the authority of the people whom I represent, has been taken solely on the basis of my opinion that the alleged orders under which we are being prosecuted today, were invalid. I have so advised my clients, and to protect their rights I advised them that I would require their signatures, and upon the basis of my opinion that the order was invalid, these people signed the authorization to take the action we have taken.

The Chief Justice: That is since the writ of prohibition was issued?

Mr. Donovan: That is since the alleged writ of prohibition was issued, Your Honor. As a matter of fact, it arose because of a situation which became evident in dealing with so many people and I have had I believe over two hundred involved in these various litigations.

I found through instances in Federal Court that some people did not understand what they were doing. So for [fol. 426] their protection and for my own protection, I advised them in writing that I did not believe any orders were valid prohibiting our action, and I advised them of the possibility and risk that we ran in testing the validity of the order. It was under those circumstances that these people signed the authority.

So that if they are in contempt; if this Court finds them that way, then the responsibility is mine, because I gave them my best judgment. And if you can't trust your lawyer

and you can't trust your doctor, there is not much chance in this old world.

As far as myself is concerned, I did receive from this Court, The Chief Justice himself, in mail correspondence, enclosing an order which was apparently signed by The Chief Justice, but which did not have the seal of the Court; did not have the attestation of the Clerk. I am willing to accept the Judge's letter with his signature that he did sign such an order. But I believe with that requirement, and the lack of the other two requirements, the seal and the attestation of the Clerk, would prohibit that order from becoming a valid process.

[fol. 427] So, it's on that basis that my opinion has been rendered, and it's on the basis of my opinion that these people acted.

I think the Court should take into consideration any possible fine or imprisonment imposed, or both, that the responsibility is mine, and that these other people acted upon my recommendations.

That is all I have to say.

The Chief Justice: Now you, of course, have a right to question the witness.

Cross examination.

By Mr. Bickley:

Q. Mr. Donovan, did you personally contact all of these people to get their written authorization?

A. No sir.

Q. Who did?

A. They were contacted—I prepared a written statement, stating the facts which I have stated to this Court. That statement was duplicated and it was delivered by various people to the other people who were participating in the lawsuit. It was a physical impossibility for me to contact every person.

[fol. 428] Q. And to which one did you give these statements to transmit them to the other people?

A. Well, I didn't handle them. I prepared the original statement. And I didn't handle the duplication.

Q. Well, who handled the duplication?

A. I don't know.

Q. To whom did you give the original statement?

A. I turned the original statement over to Mr. Pellillo.

Q. And did he handle it from there on out so far as you know?

A. Until the statements were returned to me.

Q. And you didn't have personal contact with these people in that respect?

A. Yes, I did with many of them.

Q. By what manner and means?

A. By means of meetings which were held at the Dallas Federal Savings & Loan Association—no, not the Dallas Federal Savings—The Exchange Savings, over in the Exchange Building. We had meetings there; we had meetings at Mr. Pellillo's home; I received numerous telephone calls [fol. 429] at home; at my office; I was approached by people on the street; I was approached by people in court, and this advice and my opinions were communicated to them in that manner.

Q. And did you prepare this statement after you had received a copy of the writ of prohibition from The Chief Justice?

A. My position is, Mr. Bickley, that I have never received a copy of a valid writ of prohibition. I will admit, as I have stated, that I did receive a communication from The Chief Justice, sending me an order.

Q. All right. After you received a copy of that order, did you prepare this statement for these people?

A. Yes.

Q. And then you transmitted it to them and they sent it back in writing?

A. That's right.

Q. All right. And do you have a written authorization from all the people from you purport to represent here today?

A. Yes.

Q. All right. And you did have written authorization from all of the people whom you added as additional parties [fol. 430] ties in the Brown suit, and in the case of Donovan versus The Supreme Court?

A. Yes.

Q. And before adding those parties you had notified them that this writ of prohibition, or this order as you refer to it, had been issued?

A. I didn't communicate directly with them or talk to them personally, if that's what counsel's question was.

Q. How did this information get to them?

A. By virtue of the statement which I typed and asked be circulated to anybody who was involved in any way with our lawsuit.

Q: Do you have a copy of that statement, Mr. Donovan?

A. No, I have the originals.

Q. May we see the originals?

A. I think not. I think that's a communication concerning the clients, which is privileged.

Mr. Bickley: If it please the Court, we think that counsel has waived the privilege when he took the stand and offered to tell the court that he had communicated with his clients, and what he had told his clients, and we think that this is the best evidence of this particular fact that [fol. 431] he has testified to, and we ask that he be required to produce it. It has to do with the contempt of this Court.

The Chief Justice: Overrule your objection.

Mr. Bickley: Note our exception.

The Chief Justice: —wait a minute Mr. Bickley, Mr. Donovan's objection has been sustained. You had been talking, and I overruled you. I am sorry. I sustained Mr. Donovan's objection, as to producing signed originals.

Mr. Bickley: That's what I understood. You will note our exception, please.

The Chief Justice: All right, go ahead.

By Mr. Bickley:

Q. You did represent the people who filed the suit of Brown versus City of Dallas, those who were listed in the original petition, did you not?

A. Yes sir.

Q. And in filing that petition you were representing those people?

A. Yes sir.

Q. And in appearing before that court on May 2nd, 1963 in that cause, you were representing the people that had [fol. 432] asked to be dropped from the lawsuit, were you?

A. Only for the purpose of moving their withdrawal.

Q. All right. And then you represented those who wanted to be added to the lawsuit?

A. That is correct.

Q. And you represented those who were original plaintiffs and who had not asked to be dropped from the lawsuit?

A. That is correct.

Q. And at that time you opposed the motion of the City of Dallas to dismiss that lawsuit, did you not?

A. That's right. It is a matter of record.

Q. And following that you gave notice of appeal on behalf of your clients, to the Circuit Court of Appeals, did you not?

A. Are you referring to the time of the hearing?

Q. At the time of the hearing?

A. No sir, I did not.

Q. Did you take exception to the ruling of the court at that time?

A. I think I did. The record would have to say.

[fol. 433] Q. All right. Subsequent to that time, and to-wit, on or about May 15, 1963, you did file a notice of appeal in that particular case on behalf of your clients, did you not?

A. May 16, 1963 for a still different group.

Q. What group were you representing in that appeal?

A. The ones who are named in the motion—in the notice of appeal.

Q. Only those?

A. That's right.

Q. All right. Now did this exclude those who had asked to have their names withdrawn?

A. That's right.

Q. Did it exclude any others?

A. Yes.

Q. It excluded some others?

A. Yes.

Q. And only certain ones then appealed?

A. Yes. Under the Federal rules, the only ones that appeal are the ones that are named in the notice to appeal, and that constitutes—

Q. It speaks for itself?

A. —a different group before the court now.

Q. All right. That is the one that has been introduced [fol. 434] in evidence?

A. That's right.

Q. And you filed your appeal bond on behalf of these clients?

A. Yes.

Q. And you did represent the people in the Cause No. CA-3-63-120, Civil, in the United States District Court, styled James P. Donovan, et al versus the Supreme Court of Texas, et al?

A. That's right.

Q. And you represented those who filed the original petition, including yourself?

A. That's right.

Q. And subsequent to that time and on the hearing on May 9, 1963 for purposes of withdrawal, you represented some clients who asked to be withdrawn from that lawsuit?

A. That is correct. I believe it was the same group which was involved in the Brown case, and had withdrawn to the extent that they were included as active plaintiffs in the Donovan case.

Q. And that is shown in your motion before that Court?

A. That's right.

Q. And in that same motion you also asked to add new [fol. 435] parties plaintiff?

A. That's right.

Q. And these were the same parties that had been added in the Brown suit were they not?—those who were not originally in the other suit, and who wanted to be added?

A. Yes, that is true.

Q. And you filed an answer in that lawsuit and challenged the appearance of the Attorney General on behalf of The Supreme Court, and The Court of Civil Appeals, defendants in that lawsuit, did you not?

A. I filed a petition, and then the Attorney General filed an answer.

Q. All right.

A. And the record shows that I filed a motion to strike his appearance.

Q. His appearance—

A. He also filed a motion to dismiss, plus the answer, and my responsive action was to file a motion to strike the appearance of the Attorney General on the ground that he had no authority under the constitutions of the statutes of Texas to appear in Federal Courts in behalf of the courts.

Q. Yes. And you opposed his action when he came in and [fol. 436] asked that your temporary injunction be denied, did you not?

A. No, I asked that my temporary injunction be granted.

Q. All right. And he asked that it be denied?

A. That's right.

Q. And the Court did deny the temporary injunction?

A. That's right.

Q. And then one week later, on May 16th she granted his motion to dismiss? Did she not?

A. That's right.

Q. And you opposed that?

A. That's right.

Q. All right.

A. I might say too, that we intend to appeal from that order of dismissal.

Q. Have you given notice of appeal in that case yet?

A. The judgment has not been entered. It was just delivered to my office Saturday for submission to the court, and I have not been able to do anything today.

[fol. 437] Mr. Bickley: All right. No further questions.

Mr. Bickley: Petitioners rest, Your Honor.

Mr. Donovan: Respondents rest, Your Honor.

The Chief Justice: I am going to ask the attorneys for the parties to prepare a proposed judgment.

I, of course, expect Mr. Donovan to propose a judgment to exonerate himself and his clients and the parties that have been present here today participating in this.

And I naturally expect the City's judgment to seek to hold the parties in contempt.

Both judgments should be before us please—could you

get them to us by—how soon can you get your proposed judgment in, Mr. Bickley?

We can have ours in by Wednesday morning, Your Honor.

The Chief Justice: That's too late. How about 2:00 Tuesday?

Mr. Bickley: Tomorrow—we will have it in.

The Chief Justice: All right. Mr. Donovan, when can you get your proposed judgment in?

Mr. Donovan: I think I can get it here by two o'clock [fol. 438] tomorrow. I don't need to be with it, do I Your Honor?

The Chief Justice: Oh, no.

Mr. Donovan: I've got this Arkansas case that I had before. They've got that coming up again tomorrow morning. I can do that by two o'clock tomorrow.

The Chief Justice: If attorneys for both sides will file a motion for judgment, and attach a form of judgment—you don't need to file a motion for judgment, but we would appreciate a proposed judgment, so that when we make our decision as to what we are going to do, we will have a judgment from each side before us to assist us in preparing a proper judgment.

Well, then have that in by tomorrow afternoon.

We are going to take a recess until two o'clock Wednesday afternoon.

We will require that much time to deliberate and consider the record here before us in reaching a decision.

The Court is not adjourned. This trial is not concluded. We are merely taking a recess. All of you are still under [fol. 439] the jurisdiction of the Court, and will be expected to be here Wednesday afternoon at two o'clock.

Anything else?

Mr. Donovan: Your Honor, may I add one additional ground, which I think I overlooked in my motion for dismissal.

The Chief Justice: Yes.

Mr. Donovan: I am not sure that I did, but I would like to add it as an additional ground: The failure of the City to prove, their attorneys to prove, their authority from the City of Dallas to bring this proceeding.

The Chief Justice: What about that, Mr. Kucera?

Mr. Kucera: The City Charter says that the City Attorney shall handle all legal matters.

The Chief Justice: Do we take judicial notice?

Mr. Kucera: Of the Charter, yes. Not what I do, or should do in the proceeding, but you do take judicial notice of the Charter.

The Chief Justice: Mr. Donovan has challenged your authority to represent the City.

Mr. Kucera: I think if the Court wants an answer on that we can supply it, by the authorities.

[fol. 440] Mr. Donovan: If the Court please, the proofs are closed now, and they didn't present it during the trial, and I don't think it can be supplied afterwards.

The Chief Justice: Well, you may add that to your motion to dismiss.

Mr. Donovan: Thank you, Your Honor.

The Chief Justice: There is one other thing, gentlemen. Of course, at the conclusion of the testimony it is the right of the parties to have their attorneys present argument.

Now do you wish, either one of you, to further argue the case?

Mr. Donovan: Your Honor, as far as the respondents are concerned, I think we have presented every argument available, and we will waive final closing argument.

The Chief Justice: How about you, Mr. Bickley?

Mr. Bickley: It appears to me the attorneys have belabored the Court, and we will not do so any longer, Your Honor.

The Chief Justice: I want to respect your rights. Both sides have a right to present argument following the closing of the testimony.

[fol. 441] (Conference out of hearing of reporter.)

The Chief Justice: Judge Bateman asks a very appropriate question.

Is there anyone here not represented by Mr. Donovan? Will you raise your hand, please? If there is such a person here, you have a right to be heard in your own behalf, when you don't have an attorney speaking for you. So now is the time and the occasion if anyone is here as a

party to this contempt motion, who is not represented by Mr. Donovan, now will be the ~~time~~ to step up and make yourself heard if you wish to be heard.

I will pause to give you a chance to do so. (No response.)

The Chief Justice: I take there is not. Any further questions?

(No response.)

The Chief Justice: Very well, until two o'clock Wednesday.

The Clerk of the Court: The Court of Civil Appeals is now in recess.

[fol. 442] May 22, 1963, 2:00 P.M.

The Clerk of the Court: The Honorable Court of Civil Appeals, Fifth Supreme Judicial District of Texas, is now in session.

DECISION OF THE COURT

The Chief Justice: As you know, we have re-assembled this afternoon to announce our decision in the contempt hearing, which began Monday.

I will state at the outset, that after considering the evidence, the pleadings and the whole record before us, we have reached a conclusion that the respondents have been guilty of contempt, and the appropriate penalties must be assessed.

Before I go into details, perhaps it is appropriate for me to say that as far as the Court is concerned, this is purely an impersonal matter, and it is with us wholly objective; altogether professional. There is no personal feeling involved as far as we are concerned.

We have come to the conclusion that there has been a defiance of law, and that it is our duty to take notice of it, and to take appropriate steps in view of it. It is everyone's duty to obey the law whether he likes it or not. None of us [fol. 443] is free to flout the law because we disapprove of it. Many of us, I am sure, don't like the income tax, but it is our duty to pay it.

I recall an incidence some years ago when I was riding with a man and we came to a red light, a red traffic light. He went right on through it, to my amazement, saying as he did so "it is foolish to put that light there, it isn't needed." I think it was his duty to obey the law, whether he thought the law was wise or not.

And that is true not only of the bad people, but the good people, and I say that because I think that as far as we know you are good people, not wicked people. But I must tell you it is the duty of good people to obey the law just as much as it is the bad people. There is an unfortunate tendency sometimes on the part of good people to feel that the laws were made for the bad people to observe. Of course they are in error in that. It is the duty of all of us to observe the law.

When we come to a red traffic sign it is the duty of all of us, the good people as well as the bad people, to observe the red traffic sign. That is true of you.

The evidence shows you have defied the law, and court [fol. 444] orders become part of the law.

Think of the confusion and the disaster that would follow if each of us were free to disobey court orders whenever it suited him to do so. None of us is free to pick out those laws, or those court orders which he thinks are right and which he will obey, but to pick out others and say "I don't agree with that, so I won't obey it". Why if each of us undertook to obey only those laws we approve of, and felt free to ignore or to defy the laws that we don't like, then there could be no such thing as law enforcement.

Several of you are personally known to me, for many years. That is the reason I emphasized this is an impersonal matter. It is with sadness in my case that I feel it is my duty, in conjunction with my colleagues, to find you guilty of contempt. Certainly it causes a sadness. But the fact that one or two of you or three or four of you may be personal friends of mine, of course cannot be allowed to change my views, for it would be indeed an unworthy Judge who had one rule for his friends that they could defy certain laws, and another rule for those who happen not to be acquainted with him. So, I emphasize again, this is an ob-

[fol. 445] jectional profession, and it must be as far as we are concerned.

Mr. Clerk, have you the judgment in this matter?

Clerk of the Court: I have, Your Honor.

The Chief Justice: Let me have it, please.

I will shortly read the names of those who will be assessed fines. We have decided that in the case of those whose names I shall shortly read, a fine of two hundred dollars will be assessed.

I should go further and explain to you that the payment of this fine must be made by five o'clock next Monday afternoon.

I don't know whether you contemplate refusing to pay this fine or not. But if you do, I think it is only fair to advise you of the penalties for failing to pay the fine, and that is that you will be arrested and put in jail, and that you will be given a credit on the fine of three dollars for each day you stay in jail. So if you refuse to pay the fine by the time named, you will be escorted to jail, and you may [fol. 446] purge yourselves of contempt by remaining in jail until at the rate of three dollars a day you have paid the penalty of two hundred dollars.

I will read the names of those who are fined two hundred dollars.

George Atkinson; Daniel C. Brown; Norma June Collis; Paul A. Crick; Russell Moore Crook; L. A. Danek; Lena Mae Grimes; William C. Isom; Nancy King; Janet McCluer; Helen Odom; M. J. Pellillo; Pauline Pitt; W. H. Richardson; Christine C. Slaughter; Linnis Strum; Audrey M. Karr; Mrs. Arlene E. Davis; Russell G. Rogers; Jack H. Broom; Mary R. Gore; Harvey Bell; Mary Brown; Paul H. Crawford; Anne K. Crick; Austin Crow; Fred M. Gore; Geneva Hood; W. C. Jones; R. C. Logan; H. D. McDonald; J. H. Parr; Zelma Pellillo; Jesse Powell; Marion Lee Seigel; Walter Sodeman; Charline Tomlin; J. W. Tomlin; Wm. G. Byars; Donald S. Reckrey; Dorothy Boland; Jane Broom; Juanita Isom; U. J. Boland; Martin E. Collis, Jr.; Nora Crawford; Dr. Hobson Crook; Alberta R. Crow; Frank Grimes; Wayne Hood; P. D. King; Marion Logan; James W. Odom; Joan S. Parr; R. L. Pitt; Dee

Powell; J. W. Slaughter, Jr.; James E. Strum; Lucille [fol. 447] Worrell; M. E. Worrell, Jr.; Mrs. L. A. Danek; Caroline Rogers; Dr. Grant Boland; C. D. Crudgington; Arvil Jarnan; Mary Jarman; J. D. Lowrie, Jr.; Dorothy Lusk Myrick; Lola E. Park; Geneva Quinton; Arthur G. Rudkin; Emily S. Slaughter; Browning Lotridge; Lillian Lowrie; S. A. Myrick; Anna Marie Pylant; E. W. Quinton; Helen Rudkin; Lee R. Slaughter; George B. Lotridge; Lometta McDonald; Lewis A. Park; Calvin Pylant; Faye Richardson; Richard P. Dukelow and Alberta M. Turrill.

As to those parties, they are fined each two hundred dollars. You have until five o'clock Monday afternoon to make payment to the Clerk of the Court.

The Clerk has requested that I announce that he is not authorized to accept personal checks. You may pay, if you choose to pay, with cashier's check, certified check, Post Office Money Orders, or cash. He is not authorized to accept personal checks.

I have informed you of the risk you run if you refuse to pay the fine. It will be our sad duty to issue orders for you to be imprisoned so that you may purge yourselves of contempt, each of you. For each day you remain in jail [fol. 448] you will be credited with three dollars on your fine.

Now that leaves one other of the respondents, and that's Mr. James P. Donovan. The law under which we are operating, Statute 1826 I believe, says that we may fine a person guilty of contempt up to one thousand dollars. And we have elected in your case to not fine you the maximum, but two hundred dollars, one fifth of the maximum. The law says also that we may imprison for contempt up to twenty days in jail.

In the case of Mr. Donovan, we feel there is less excuse than there is in the case of the others of you, for your failure to obey the orders of this Court.

So we have assessed a jail sentence for Mr. Donovan, twenty days in jail.

It is the further Order, Judgment and Decree of this Court, upon failure of this respondent to pay the fine as hereinabove assessed—well, I told you that. It is the fur-

ther Order, Judgment and Decree of this Court that the respondent James P. Donovan be and he is hereby adjudged in contempt of this court, and that his punishment be confinement in the County Jail of Dallas County, Texas with [fol. 449] out bail for a period of twenty consecutive days from this date; and that he be remanded forthwith to the custody of the Sheriff of Dallas County, for the purpose of that confinement.

Have you the commitment ready?

Clerk of the Court: I have, Your Honor.

The Chief Justice: Will you hand it to the Sheriff.

The Chief Justice: Mr. Sheriff, you are ordered to take Mr. Donovan into custody.

Mr. Donovan: If the court please?

The Chief Justice: Yes.

Mr. Donovan: Before the Sheriff takes me away, I would like to ask the Court, to clear the record, I submitted a judgment in which I requested the Court to make certain findings of fact and conclusions of law, and I filed a motion that that judgment be entered.

The Chief Justice: Your motion for judgment is overruled.

Mr. Donovan: —the request for findings of fact and conclusions of law are denied?

The Chief Justice: We are not overruling that motion. [fol. 450] We will in due time file our findings of fact and conclusions of law.

Mr. Donovan: In other words, the judgment is entered the findings of facts and conclusions of law are made? Do I understand that?

The Chief Justice: No, we made a finding of fact and conclusion of law in our judgment.

Mr. Donovan: I haven't seen a judgment. I was not furnished with a copy of it.

The Chief Justice: Mr. Clerk, have you a copy of the judgment?

The Clerk: The Sheriff has a copy for him.

The Chief Justice: Yes, a copy of the judgment is attached to your commitment, Mr. Donovan.

REQUEST FOR STAY ORDER AND RULING THEREON

Mr. Donovan: May I make one other request to the court, and that is for a stay of execution until I can prepare a writ of habeas corpus?

The Chief Justice: That will be overruled.

Mr. Donovan: May I make this application to the Court, that I have a stay of execution so that I can apply to the [fol. 451] Circuit Court of New Orleans for an injunction against the action of this Court?

The Chief Justice: The stay order will be denied, Mr. Donovan.

Mr. Donovan: I guess, Your Honor, I am ready to go to jail.

The Chief Justice: Very well, Mr. Sheriff.

Mr. Donovan: I would like to say this to the Court; that in my own behalf and in behalf of the other people here, that while what the Court says we have no choice as to obeying the law, and that we don't have the right to choose what laws we obey; our actions have all been taken in the belief and in the sincere belief that the law as interpreted has not been violated.

We have only tried to exercise our rights in that direction.

I do want to assure this Court that I at no time have been contemptuous of it, nor do I intend to.

The Chief Justice: Is there anything else, Mr. Donovan?

Mr. Donovan: No sir, that is all. Thank you.

[fol. 452] The Chief Justice: Very well. Mr. Sheriff, will you take charge of the prisoner.

Clerk of the Court: The Honorable Court of Civil Appeals now stands adjourned.

End of hearing.

[fol. 455] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 456]

EXCERPT FROM PETITIONERS' EXHIBIT NO. 19

No. 16,193

IN THE COURT OF CIVIL APPEALS
FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS, TEXAS

CITY OF DALLAS, a municipal corporation, ET AL.,

Petitioners,

VS.

DANIEL C. BROWN, ET AL.,

Respondents.

ORDER TO SHOW CAUSE

This the 7th day of May, 1963, came on to be considered the complaint supported by due affidavit of N. Alex Bickley, Attorney for the City of Dallas seeking to have DOROTHY BOLAND held in and punished for contempt of this Court in the above matter because of the conduct below mentioned; and the Court being of the opinion that the complaint is legal and states grounds therefor;

IT IS ORDERED that the said DOROTHY BOLAND show cause before this Court at the Courthouse in Dallas County, Texas, in the court room of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at 9:00 o'clock A.M. on Monday, May 13, 1963, why he/she should not be punished as for contempt for conduct in filing Cause No. CA-3-63-120 Civil, in the United States District Court styled James P. Donovan et al v. The Supreme Court of Texas et al, which conduct occurred subsequent to notice of Writ of Prohibition and Ancillary Orders issued by this Court ordering and prohibiting such action, and which is more specifically set out in the complaint filed herein.

[fol. 457] The Clerk of this Court is hereby Ordered and Directed to serve notice and a copy of this Order on the

above mentioned party to appear at the time hereinabove set out and at the place designated, to answer and show cause, if any, why he/she should not be adjudged in contempt of this Court and be punished as provided by law.

/s/ DICK DIXON
Dick Dixon, Chief Justice
Court of Civil Appeals for the Fifth
Supreme Judicial District of Texas
at Dallas, Texas

Came to hand on the 7th day of May, A.D. 1963, at 5:30 o'clock P.M.

Executed at Dallas, Texas, within the County of Dallas at 6:02 o'clock P M on the 8th day of May A.D. 1963, by delivering to the within named DOROTHY BOLAND, in person at 2923 Kendale Drive, Dallas, Texas, address, a true copy of this citation endorsed as below stated, together with the accompanying copy of the Show Cause Order.

The distance actually travelled by me in serving such process was miles and my fees are as follows:

For serving this citation 1 copy	\$ 1.00
For Mileage 36 miles	\$ 3.60
Total fees	\$ 4.60

To certify which witness my hand officially.

BILL DECKER
Sheriff of Dallas County, Texas

By /s/ F. L. VRLA
Deputy

CAUSE NO. **BILL DECKER, SHERIFF** No. 135137
16,193 DALLAS COUNTY, TEXAS

PLAINTIFF

DEFENDANT

DALLAS, CITY OF

BROWN, DANIEL C. ET AL

ADDRESS

ADDRESS

DEPUTY PERSON SERVED PLEASE RETURN ONE COPY
**VRLA DOROTHY BOLAND OF INVOICE WITH
2923 KENDALE REMITTANCE**

DATE REC'D TYPE OF SERVICE DATE SERVED FEE CHARGED
5-7-63 ORDER 5-8-63 4.60

PAPERS WERE SERVED ON PLEASE PAY THIS
THE ABOVE NAMED AND NUMBERED CAUSE. AMOUNT **4.60**

NAME AND ADDRESS AMOUNT RECEIVED
TO WHOM SENT WITH PAPERS
**CT. CIV. APPLS. \$
SUP. JUD. DIST. DALLAS**

INVOICE

[fol. 458]. Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 458a]

PETITIONERS' EXHIBIT No. 20

Cause No. 16,193 styled: City of Dallas et al v. Daniel C. Brown et al

List of persons to whom copy of Writ of Prohibition was mailed:

<i>Name</i>	<i>Mailing Address</i>	
Daniel C. Brown	3064 Cridelle Avenue	Dallas, Texas
Mary Brown	—do—	—do—
R. L. Pitt	5422 Stoneleigh Avenue	—do—
Pauline Pitt	5422 Stoneleigh Avenue	—do—
Harvey Bell	9428 Overlake Drive	—do—
Austin Crow	2807 Bachman Drive	—do—
Alberta R. Crow	—do—	—do—
Frank Grimes	3050 Community Drive	—do—
Lena Mae Grimes	—do—	—do—
Winton R. Dukelow	2900 Northwest Highway	—do—
Patricia P. Dukelow	—do—	—do—
W. H. Richardson	2755 Bachman Drive	—do—
Faye Richardson	—do—	—do—
B. D. Siegel	3054 Cridelle Avenue	—do—
Marion Lee Siegel	—do—	—do—
Charles Williamson	3061 Cridelle Avenue	—do—
Jerry Williamson	—do—	—do—
Paul A. Crick	9615 Overlake Drive	—do—
Anne K. Crick	—do—	—do—
E. W. Quinton	2930 Clydedale Drive	—do—
Geneva Quinton	2930 Clydedale Drive	—do—
W. C. Jones	9715 Starlight Road	—do—
U. J. Boland	2923 Kendale Drive	—do—
Dorothy Boland	—do—	—do—
Arthur G. Rudkin	3064 Sumter Drive	—do—
Helen Rudkin	—do—	—do—

<i>Name</i>	<i>Mailing Address</i>	
James E. Strum	9706 Overlake Drive	Dallas, Texas
Linnis Strum	—do—	—do—
Paul M. Crawford	2747 Bachman Drive	—do—
Nora Crawford	—do—	—do—
Martin E. Collis, Jr.	9515 Overlake Drive	—do—
Norma June Collis	—do—	—do—
Arthur E. Tappan	2928 Northwest Highway	—do—
Bettie Tappan	—do—	—do—
E. Gardner Clapp	3034 Clydedale Drive	—do—
Stella Clapp	—do—	—do—
George Atkinson	2923 Northwest Highway	—do—
Jack H. Broom	5418 Bradford Drive	—do—
Jane Broom	—do—	—do—
George B. Lotridge	5422 Bradford Drive	—do—
Browning Lotridge	—do—	—do—
[fol. 458b]		
J. W. Tomlin	3050 Norwalk	—do—
Charline Tomlin	—do—	—do—
H. P. McDonald	3001 Kendale Drive	—do—
Lometta McDonald	—do—	—do—
J. D. Lowrie, Jr.	3018 Kendale Drive	—do—
Lillian Lowrie	—do—	—do—
Anna Marie Pylant	3727 Texas Drive	—do—
Calvin Pylant	—do—	—do—
Lewis A. Park	3074 Norwalk	—do—
Lola E. Park	—do—	—do—
S. A. Myrick	3054 Norwalk	—do—
Dorothy Lusk Myrick	—do—	—do—
Robert L. Brackett	2930 Storey Lane	—do—
William C. Isom	3001 Community Drive	—do—
Juanita Isom	—do—	—do—
E. T. Cramer	5807 Gramercy Place	—do—

<i>Name</i>	<i>Mailing Address</i>	
Walter Sodeman	3320 Inwood Road	Dallas, Texas
Lee R. Slaughter	9507 Overlake Drive	—do—
Emily F. Slaughter	—do—	—do—
J. H. Parr	9525 Overlake Drive	—do—
Joan S. Parr	—do—	—do—
J. W. Slaughter, Jr.	9530 Overlake Drive	—do—
Christine C. Slaughter	—do—	—do—
R. F. Slaughter	3236 O'Bannon Drive	—do—
James W. Odom	2624 Community Drive	—do—
Helen Odom	—do—	—do—
S. R. Kirby	2803 Kendale Drive	—do—
M. J. Pellillo	2830 Kendale Drive	—do—
Zelma Pellillo	—do—	—do—
Jean Shaw	3045 Cridelle Avenue	—do—
C. D. Crudgington	3033 Oradell Lane	—do—
Harriet G. Crudgington	—do—	—do—
Dr. Hobson Crook	9631 Overlake Drive	—do—
Russell Moore Crook	—do—	—do—
J. O. Garrett	2801 Clydedale Drive	—do—
Amy Rose Garrett	—do—	—do—
Paul Short	9909 Starlight Road	—do—
Besa Fairtrace Short	—do—	—do—
R. C. Logan	2903 Clydedale Drive	—do—
Marion Logan	—do—	—do—
Dee Powell	3049 Kendale Drive	—do—
Jessie Powell	—do—	—do—
[fol. 458c]		
Arthur B. MacKinstry III	3401 Cridelle Avenue	—do—
June C. MacKinstry	—do—	—do—
James H. Murray	9720 Starlight Road	—do—
E. T. Busch	2829 Bachman Drive	—do—
Louise Busch	—do—	—do—

<i>Name</i>	<i>Mailing Address</i>	
P. D. King	5418 Stoneleigh Avenue	Dallas, Texas
Nancy King	—do—	—do—
M. E. Worrell, Jr.,	2922 Kendale Drive	—do—
Lucille Worrell	—do—	—do—
Dr. Grant Boland	2831 Clydedale Drive	—do—
J. F. McClain	5419 Bradford Drive	—do—
Charlene McClain	—do—	—do—
Fred M. Gore	3055 Cridelle Avenue	—do—
Mary R. Gore	—do—	—do—
L. A. Danek	3024 Oradell Lane	—do—
Lawrence R. Schmidt	3040 Community Drive	—do—
Wayne Hood	9630 Overlake Drive	—do—
Geneva Hood	—do—	—do—
J. M. Berry	3021 Bachman Drive	—do—
Ethel Berry	—do—	—do—
C. J. Bitter	2821 Bachman Drive	—do—
Patricia Bitter	—do—	—do—
Janet McCluer	3531 Bolivar	—do—
Forrest McKee	5111 Hall Street	—do—
Dorothy McKee	—do—	—do—
James O. Boyd	3904 Highgrove Drive	—do—
Robie Boyd	—do—	—do—
Alberta M. Turrill	1413 N. Garrett Avenue	—do—
Arvil Jarman	3060 Norwalk	—do—
Mary Jarman	—do—	—do—
William S. Holden	2915 Community Drive	—do—
Virginia Holden	—do—	—do—
Harvey Waldman	2605 Willow Brook Road	—do—
Evelyn Waldeman	—do—	—do—
J. W. McCulley	2327 Langdon Avenue	—do—
J. H. Huddleston	3326 Cherrywood Drive	—do—
Richard Zacha	6342 Palo Pinto Avenue	—do—

[fol. 459]

IN THE COURT OF CIVIL APPEALS FOR THE
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

No. 16193

CITY OF DALLAS,

v.

DANIEL C. BROWN, et al.

JUDGMENT OF CONTEMPT—May 22, 1963

This the 20th day of May, 1963, came on to be heard the above entitled and numbered matter, which had previously been set for the 13th day of May, 1963, but on motion and supplemental motion for continuance made by James P. Donovan as attorney for the Respondents, the same was continued by order of the Court until this date, and in which cause George Atkinson, Harvey Bell, U. J. Boland, Daniel C. Brown, Mary Brown, Martin E. Collis, Jr., Norma Jane Collis, Paul H. Crawford, Nora Crawford, Paul A. Crick, Anne K. Crick, Dr. Hobson Crook, Russell Moore Crook, Austin Crow, Alberta R. Crow, L. A. Danek, Fred M. Gore, Frank Grimes, Lena Mae Grimes, Geneva Hood, Wayne Hood, William C. Isom, W. C. Jones, P. D. King, Naney King, R. C. Logan, Marion Logan, Janet McCluer, H. P. McDonald, James W. Odom, Helen Odom, J. H. Parr, Joan S. Parr, M. J. Pellillo, Zelma Pellillo, R. L. Pitt, Pauline Pitt, Jessie Powell, Dee Powell, W. H. Richardson, Marion Lee Siegel, J. W. Slaughter, Jr., Christine C. Slaughter, Walter Sodeman, James E. Strum, Linnis Strum, J. W. Tomlin, Charline Tomlin, M. E. Worrell, Jr., Lucille Worrell, Harvey Waldman, Evelyn Waldman, Audrey M. Karr, William G. Byars, Mrs. L. A. Danek, Mfs. Arlene E. Davis, Donald S. Reckrey, Caroline Rogers, Russell G. Rogers, Dorothy Boland, Dr. Grant Boland, Jack-H. Broom, Jane Broom, C. D. Crudgington, James P. Donovan, Mary R. Gore, J. H. Huddleston, Juanita Isom, Arvil Jarman, Mary Jarman, George B. Lotridge, Bröwning Lotridge, J. D. Lowrie, Jr., Lillian Lowrie, Lometta McDonald, Doro-

thy Lusk Myrick, S. A. Myrick, Lewis A. Park, Lola E. Park, Anna Marie Pylant, Calvin Pylant, Geneva Quinton, E. W. Quinton, Faye Richardson, Arthur G. Rudkin, Helen Rudkin, Patricia P. Dukelow, Emily F. Slaughter, Lee R. Slaughter and Alberta M. Turrill were, pursuant to due complaint, (which is found to be legal and to state good grounds therefor) ordered to show good cause why they should not be punished as for contempt for their conduct in such complaint and order specified, to-wit:

[fol. 460]

George Atkinson,	Harvey Bell,	U. J. Boland,
Daniel C. Brown,	Mary Brown,	Martin E. Collis, Jr.,
Norma June Collis,	Paul H. Crawford,	Nora Crawford,
Paul A. Crick,	Anne K. Crick,	Dr. Hobson Crook,
Russell Moore Crook,	Austin Crow,	Alberta R. Crow,
L. A. Danek,	Fred M. Gore,	Frank Grimes,
Lena Mae Grimes,	Geneva Hood,	Wayne Hood,
William C. Isom,	W. C. Jones,	P. D. King,
Nancy King,	R. C. Logan,	Marion Logan,
Janet McCluer,	H. P. McDonald,	James W. Odom,
Helen Odom,	J. H. Parr,	Joan S. Parr,
M. J. Pellillo,	Zelma Pellillo,	R. L. Pitt,
Pauline Pitt,	Jessie Powell,	Dee Powell,
W. H. Richardson,	Marion Lee Siegel,	J. W. Slaughter, Jr.
Christine C. Slaughter	Walter Sodeman,	James E. Strum,
Linnis Strum,	J. W. Tomlin,	Charline Tomlin,
M. E. Worrell, Jr.,	Lucille Worrell	

in that they;

(a) Failed to request the United States District Court to dismiss Cause No. 9276, styled Daniel C. Brown et al v. City of Dallas et al;

- (b) Contested the dismissal of the cause of Daniel C. Brown, et al v. City of Dallas et al, No. 9276, pending in the United States District Court;
- (c) Took exception preparatory to appeal of the order of the United States District Court dismissing Cause No. 9276 styled Daniel C. Brown et al v. City of Dallas et al; and
- (d) Filed Cause No. CA-3-63-120 Civil, in the United States District Court styled James P. Donovan et al v. The Supreme Court of Texas, et al;

and Audrey M. Karr in that she:

- (a) Joined as a party Plaintiff in Cause No. 9276 in the United States District Court styled Daniel C. Brown et al v. City of Dallas et al;
- (b) Contested the dismissal of the cause of Daniel C. Brown et al v. City of Dallas et al, No. 9276, pending in the United States District Court;

[fol. 461] (c) Took exception preparatory to appeal of the order of the United States District Court dismissing Cause No. 9276 styled Daniel C. Brown et al v. City of Dallas et al; and

- (d) Filed Cause No. CA-3-63-120 Civil, in the United States District Court styled James P. Donovan et al v. The Supreme Court of Texas, et al;

and

William G. Byars, Mrs. L. A. Danek, Mrs. Arlene E. Davis,
Donald S. Reckrey, Caroline Rogers, Russell G. Rogers,

in that they:

- (a) Joined as parties Plaintiff in Cause No. 9276 in the United States District Court, styled Daniel C. Brown et al v. City of Dallas et al;
- (b) Contested the dismissal of the cause of Daniel C. Brown et al v. City of Dallas et al, No. 9276, pending in the United States District Court;

(c) Took exception preparatory to appeal of the order of the United States District Court dismissing Cause No. 9276, styled Daniel C. Brown et al v. City of Dallas, et al;

and

Dorothy Boland	Dr. Grant Boland	Jack H. Broom
Jane Broom	C. D. Crudgington	James P. Donovan
Mary R. Gore	Juanita Isom	Arvil Jarman
Mary Jarman	Browning Lotridge	George B. Lotridge
J. D. Lowrie, Jr.	Lillian Lowrie	Lometta McDonald
Dorothy Lusk Myrick	S. A. Myrick	Lewis A. Park
Lola E. Park	Anna Marie Pylant	Calvin Pylant
Geneva Quinton	E. W. Quinton	Faye Richardson
Arthur G. Rudkin	Helen Rudkin	

in that they did file Cause No. CA-3-63-120 Civil, in the United States District Court styled James P. Donovan et al v. The Supreme Court of Texas et al, and

Patricia P. Dukelow	Emily F. Slaughter	Lee R. Slaughter
Alberta M. Turrill		

in

(a) Failing to request the United States District Court to dismiss Cause No. 9276 styled Daniel C. Brown et al v. City of Dallas et al;

[fol. 462] (b) Contesting the dismissal of the cause of Daniel C. Brown et al v. City of Dallas et al, No. 9276, pending in the United States District Court;

(c) Taking exception preparatory to appeal of the order of the United States District Court dismissing Cause No. 9276 styled Daniel C. Brown et al v. City of Dallas et al; and

it appearing to the Court that each of the said Respondents has been duly cited to appear and answer herein and that they and each of them has filed answer, and the said James P. Donovan after filing an appearance filed a Motion to Quash, which was overruled, and the Court having heard the same, as well as the complaint, due proof of such contempt, and the evidence offered by James P. Donovan, who was the only Respondent who testified and who in his testimony testified that he had advised his clients, the other Respondents herein, in writing that the Order of this Court issued on the 16th day of April, 1963, was invalid and that they were not required to obey it and that each of the Respondents who did not request to be dropped from the pending cases in the Federal Court authorized him in writing to proceed with the prosecution of the same, and who further stated to the Court as attorney for the Respondents that he had advised them not to testify before this Court on this hearing, and each of the Respondents when offered opportunity by the Court to testify in person refused to do so, and the Court having further heard the argument of counsel of both parties is of the opinion that the said Respondents are each and every one guilty of contempt of this Court by reason of the acts alleged and proved, as hereinabove specifically set forth.

It appearing that the Respondents B. D. Siegel, G. C. Karr, Harriet G. Crudgington, Arthur B. MacKinstry III, June C. MacKinstry and Winton R. Dukelow were not served with notice of the Order to Show Cause and did not appear in Court in person or by attorney, no judgment is rendered against them, but the cause against each of them shall remain pending service of notice and hearing, [fol. 463] It further appearing to the Court that the Respondents J. H. Huddleston, Harvey Waldman, Evelyn Waldman, Amy Rose Garrett, J. O. Garrett, Besa Fairtrace Short and Paul Short have absolved themselves of any contempt of this Court and will obey the orders of the Court, no punishment is adjudged against them, except they shall pay the proportionate part of the costs due by each of them, for which execution shall issue.

It Is Therefore Ordered, Adjudged and Decreed by this
Court that

George Atkinson,	Harvey Bell,	U. J. Boland,
Daniel C. Brown,	Mary Brown,	Martin E. Collis, Jr.,
Norma June Collis,	Paul H. Crawford,	Nora Crawford,
Paul A. Crick,	Anne K. Crick,	Dr. Hobson Crook,
Russell Moore Crook,	Austin Crow,	Alberta R. Crow,
L. A. Danek,	Fred M. Gore,	Frank Grimes,
Lena Mae Grimes,	Geneva Hood,	Wayne Hood,
William C. Isom,	W. C. Jones,	P. D. King,
Nancy King	R. C. Logan,	Marion Logan,
Janet McCluer,	H. P. McDonald,	James W. Odom,
Helen Odom,	J. H. Parr,	Joan S. Parr,
M. J. Pellillo,	Zelma Pellillo,	R. L. Pitt,
Pauline Pitt,	Jessie Powell,	Dee Powell,
W. H. Richardson,	Marion Lee Siegel,	J. W. Slaughter, Jr.,
Christine C. Slaughter	Walter Sodeman,	James E. Strum,
Linnis Strum,	Charline Tomlin,	Lucille Worrell,
Audrey M. Karr,	J. W. Tomlin,	M. E. Worrell, Jr.,
Mrs. Arlene E. Davis,	William G. Byars,	Mrs. L. A. Danek,
Russell G. Rogers,	Donald S. Reckrey,	Caroline Rogers,
Jack H. Broom,	Dorothy Boland,	Dr. Grant Boland,
Mary R. Gore,	Jane Broom,	C. D. Crudgington,
[fol. 464]	Juanita Isom;	Arvil Jarman,
Mary Jarman,	Browning Lotridge,	George B. Lotridge,
J. D. Lowrie, Jr.,	Lillian Lowrie,	Lometta McDonald,
Dorothy Lusk Myrick,	S. A. Myrick,	Lewis A. Park,
Lola E. Park,	Anna Marie Pylant,	Calvin Pylant,
Genéva Quinton,	E. W. Quinton,	Faye Richardson.

Arthur G. Rudkin, Helen Rudkin, Patricia P. Dukelow,
Emily F. Slaughter, Lee R. Slaughter, Alberta M. Turrill,

Respondents, be and they are hereby adjudged to be in contempt of this Court, and the punishment of each is a fine in the amount of Two Hundred (\$200.00) Dollars to be paid by each and every one of them on or before the twenty-seventh (27th) day of May, 1963 at five (5) o'clock in the afternoon, to the Clerk of this Court.

It Is the Further Order, Judgment and Decree of this Court that upon failure of the said Respondents to pay the fines hereinabove assessed within the time hereinabove specified, each of said Respondents so failing shall be imprisoned in the County Jail of Dallas County, Texas, without bail, until such time as said Respondent shall have purged himself or herself of said contempt by payment of the fine as herein assessed against him or her, or until the further orders of this Court.

It Is Further Ordered, Adjudged and Decreed by the Court that the Respondent James P. Donovan be, and he is hereby, adjudged to be in contempt of this Court and that his punishment be confinement in the County Jail of Dallas County, Texas, without bail, for a period of twenty (20) consecutive days beginning on this date, and that he be remanded forthwith to the custody of the Sheriff of Dallas County, Texas, for the purpose of such confinement.

The costs of this cause are hereby taxed against all of the above Respondents pro rata, for which let execution issue.

[fol. 465] It Is Further Ordered by the Court that the Clerk of this Court shall issue the necessary commitments and executions to carry into effect the terms and provisions of this judgment.

Signed, rendered and entered upon the minutes of this Court, at Dallas, Texas, this 22nd day of May, 1963.

Diek Dixon, Chief Justice, Claude Williams, Associate Justice, Harold A. Bateman, Associate Justice.

[fols. 466-467] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 468] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
No. 9276 Civil

DANIEL C. BROWN, MARY BROWN, R. L. PITTS, PAULINE PITTS,
HARVEY BELL, AUSTIN CROW, ALBERTA R. CROW, FRANK
GRIMES, LENA MAE GRIMES, WINTON R. DUKELOW,
PATRICIA P. DUKELOW, W. H. RICHARDSON, FAYE RICH-
ARDSON, B. D. SIEGEL, MARION LEE SIEGEL, CHARLES WIL-
LIAMSON, JERRY WILLIAMSON, PAUL A. CRICK, ANNE K.
CRICK, E. W. QUINTON, GENEVA QUINTON, W. C. JONES,
U. J. BOLAND, DOROTHY BOLAND, ARTHUR G. RUDKIN,
HELEN RUDKIN, JAMES E. STRUM, LINNIS STRUM, PAUL
M. CRAWFORD, NORA CRAWFORD, MARTIN E. COLLIS, JR.,
NORMA JUNE COLLIS, ARTHUR E. TAPPAN, BETTIE TAPPAN,
E. GARDNER CLAPP, STELLA CLAPP, GEORGE ATKINSON,
JACK H. BROOM, JANE BROOM, GEORGE B. LOTRIDGE,
BROWNING LOTRIDGE, J. W. TOMLIN, CHARLINE TOMLIN,
H. P. McDONALD, LOMETTA McDONALD, J. D. LOWRIE,
JR., LILLIAN LOWRIE, ANNA MARIE PYLANT, CALVIN
PYLANT, LEWIS A. PARK, LOLA E. PARK, S. A. MYRICK,
DOROTHY LUSK MYRICK, ROBERT L. BRACKETT, WILLIAM
C. ISOM, JUANITA ISOM, E. T. CRAMER, WALTER SODEMAN,
LEE R. SLAUGHTER, EMILY F. SLAUGHTER, J. H. PARR,
JOAN S. PARK, J. W. SLAUGHTER, JR., CHRISTINE C.
SLAUGHTER, R. F. SLAUGHTER, JAMES W. ODOM, HELEN
ODOM, S. R. KIRBY, M. J. PELLILLO, ZELMA PELLILLO,
JEAN SHAW, C. D. CRUDGINGTON, HARRIET G. CRUDGING-
TON, DR. HOBSON CROOK, RUSSELL MOORE CROOK, J. O.
GARRETT, AMY ROSE GARRETT, PAUL SHORT, BESA FAIR-
TRACE SHORT, R. C. LOGAN, MARION LOGAN, DEE POWELL,
[fol. 469] JESSIE POWELL, ARTHUR B. MACKINSTRY, III,
JUNE C. MACKINSTRY, JAMES H. MURRAY, E. T. BUSCH,
LOUISE BUSCH, P. D. KING, NANCY KING, M. E. WORRELL,
JR., LUCILLE WORRELL, DR. GRANT BOLAND, J. F. MC-
CLAIN, CHARLENE MCCLAIN, FRED M. GORE, MARY R. GORE,
L. A. DANEK, LAWRENCE R. SCHMIDT, WAYNE HOOD,

GENEVA HOOD, J. M. BERRY, ETHEL BERRY, C. J. BITTER,
PATRICIA BITTER, JANET MCCLUE, FORREST MCKEE,
DOROTHY MCKEE, JAMES O. BOYD, ROBIE BOYD, ALBERTA
M. TURRILL, ARVIL JARMAN, MARY JARMAN, WILLIAM S.
HOLDEN, VIRGINIA HOLDEN, HARVEY WALDMAN, EVELYN
WALDEMAN, J. W. MCCULLEY, J. H. HUDDLESTON, RICHARD
ZACHA, Plaintiffs,

vs.

CITY OF DALLAS, TEXAS, WILL WILSON, Attorney General of
the State of Texas, EARLE CABELL, ELGIN B. ROBERTSON,
CHARLES S. SHARP, CARRIE E. WELCH, DR. R. A. SELF,
JOE G. MOODY, MRS. ELIZABETH BLESSING, WALTER H.
COUSINS, JR., GEORGE M. UNDERWOOD, JR., ELGIN E.
CRULL, HAROLD G. SHANK, E. LYNN CROSSLEY, HENRY
P. KUCERA, GEORGE P. COKER, JR., RAUSCHER, PIERCE &
COMPANY, INC., ALMON & MCKINNEY, INC., McCALL,
PARKHURST, CROWE, McCALL & HORTON, AVERY MAYS,
W. C. (DUB) MILLER, DALLAS GORDON RUPE, HERBERT L.
NICHOLS, and TROY C. BATESON, Defendants.

PLAINTIFFS' ORIGINAL COMPLAINT—Filed September 24, 1962

Plaintiffs, complaining of the Defendants, allege:

1.

That this action arises under the 14th Amendment to the Constitution of the United States, Section 1; U.S.C. Title [fol. 470] 42, Sections 1971, 1981, 1983, 1985; and U.S.C. Title 15, Section 77q; this Court has jurisdiction of this cause under U.S.C. Title 28, Sections 1331 and 1343, and U.S.C. Title 15, Section 77v.

2.

That the above named Plaintiffs are all taxpayers of the City of Dallas, Texas, and the owners of homes situate within the approach areas of existing and proposed runways at Love Field, a Municipal Airport lying wholly within the corporate limits of said City of Dallas, Texas.

3.

That the City of Dallas is a Municipal Corporation Chartered under the Home Rule Law of the State of Texas (V.C.T.S. 1165 et seq.) with a population of 762,000 people according to the last United States Census.

4.

That the Defendant, Will Wilson, is the Attorney General of the State of Texas, and is sued herein in that capacity.

5.

That the following named Defendants are sued individually and in their respective capacities as officials of the Defendant, City of Dallas, to wit: Earle Cabell, Mayor and Councilman, Elgin B. Robertson, Mayor Pro Tem and Councilman, Council Members Charles S. Sharp, Carie E. Welch, Dr. R. A. Self, Joe G. Moody, Mrs. Elizabeth Blessing, Walter H. Cousins, Jr., and George M. Underwood, Jr., City Manager Elgin E. Crull, City Secretary Harold G. Shank, City Auditor, E. Lynn Crossley, City Attorney, [fol. 471] Henry P. Kucera, and Director of Aviation, George P. Coker, Jr.

6.

That the Defendant, Rauscher, Pierce & Company, Inc., a corporation duly licensed to do business in the State of Texas, is sued in its capacity as a securities dealer, licensed under Federal and Texas Statutes, and as a Financial Consultant to the City of Dallas for its Airport Improvement Program.

7.

That the Defendant, Almon & McKinney, Inc. is a corporation licensed to business in Texas, and is sued in its capacity as a securities dealer licensed under Federal and Texas Statutes, and as a Financial Consultant to the City of Dallas for its Airport Improvement Program.

8.

That the Defendant firm, McCall, Parkhurst, Crowe, McCall & Horton is a co-partnership, composed of Attorneys duly licensed to practice in the State of Texas, which firm is sued herein in its capacity as legal counsel to the Defendants, City of Dallas, Rauscher, Pierce & Company, Inc. and Almon & McKinney, Inc.

9.

That the Defendants, Avery Mays, W. C. (Dub) Miller, Dallas Gordon Rupe, Herbert L. Nichols and Troy C. Bateson are sued herein individually, as owners and holders of City of Dallas, Texas Airport Revenue Bonds, the validity of which is herein questioned, and as representatives of the Class, consisting of the Owners and Holders of all outstanding City of Dallas, Texas Airport Revenue Bonds, the persons constituting such class being so numerous as to make [fol. 472] it impracticable to bring them all before the court.

10.

That, in 1947, the Texas Legislature passed the Texas Municipal Airports Act (V.C.T.S. Art. 46d-1—46d-22), a general statute relating to aeronautics and providing for acquisition, construction, maintenance, operation and regulation by municipalities and counties of airports and air navigation facilities, and for financing acquisition costs and improvements of the same by issues of general or special obligation bonds, revenue bonds or other forms of bonds, provided such bonds were authorized by a majority of the taxpayers voting at an election at which the proposition for the issuance of said bonds was submitted; the Legislature further provided that the Municipal Airports Act was cumulative of and in addition to all laws of the State of Texas on the subject; said Act has been, and still is, in full force and effect in the State of Texas.

11.

That in violation of the provisions of the Texas Municipal Airports Act, the Defendant City of Dallas, acting through

its duly elected and appointed officials, has illegally, wrongfully and without submitting a proposition for the issuance of said revenue bonds to the taxpayers as required by said Act, issued the following Airport Revenue Bonds, in the amounts-stated, on the dates shown, and amortized the same as set forth hereinafter:

<i>Amount of Issue</i>	<i>Date</i>	<i>Series</i>	<i>Outstanding</i> <i>9/30/61</i>
\$ 110,000	6/1/53	323	\$ 26,000
200,000	8/1/55	352	59,000
6,250,000	9/1/56	363	6,250,000
[fol. 473]			
6,500,000	11/1/56	364	5,330,000
1,350,000	9/1/57	370	1,170,000
1,150,000	6/1/57	371	1,050,000
575,000	12/1/60	390	550,000
265,000	6/1/59	15	254,000
<hr/>			<hr/>
\$16,400,000			\$14,689,000

12.

That the issuance and payment of the Airport Revenue Bonds, described in the foregoing schedule, was made by the Defendant City of Dallas under color of a statute identified as Article 1269-j-5 of the Texas Revised Civil Statutes, which Statute, as applied by the officials of the City of Dallas, is unconstitutional and void, and is further unconstitutional and void as a prohibited special law under the Texas Constitution.

13.

That the Defendant City of Dallas and the named Defendant City Officials have in the past authorized and approved the payment of principal and interest on the void bonds listed above, and have affirmed that they plan to continue authorization of payment of the principal and interest due thereon in the future, unless such payments be enjoined by this Court.

14.

That the proceeds derived from the illegal sale of the above described Airport Revenue Bonds, have been used to enlarge and develop the Municipal Airport, known as Love Field and to expand air operations therefrom, which action has unreasonably interfered with Plaintiffs' rights to quiet enjoyment of their homes, and has unreasonably placed the lives and health of said families and their neighbors [fol. 474] and all persons moving about the City of Dallas, Texas in jeopardy.

15.

That the refusal of the Defendant City of Dallas and the Defendant City Officials to submit propositions for the issuance of said bonds to taxpayers' elections as required by statute constitutes a denial of Plaintiffs' elective franchise, and their legal rights to determine to what extent the Municipal Airport shall be developed and how the revenues derived therefrom shall be expended, all of which rights are guaranteed to Plaintiffs by the Constitution of the United States, the Federal Statutes and the Constitution and Statutes of the State of Texas.

16.

That all of the above named Defendants, except Troy C. Bateson, have conspired together and do continue to conspire together for the purpose of depriving Plaintiffs directly and indirectly of equal protection of the laws and of equal privileges under the laws, and for the purpose of preventing or hindering the constituted authorities of the State of Texas from giving and securing to all persons within the State, equal protection of the laws, and have under color of statute subjected Plaintiffs to the deprivation of rights, privileges and immunities in the following manner:

(a) they have authorized the construction of an additional instrument runway at Love Field, which runway construction is in violation of the Statutes of the United States, Regulations adopted thereunder, and the statutes of the State of Texas, and will constitute a burden upon interstate

commerce in violation of Article 1, Section 8, of the United [fol. 475] States Constitution, in that it will unreasonably increase the risk of life and possible physical injury to interstate passengers arriving and departing Love Field by aircraft.

- (b) they propose to finance such illegal runway construction by the issuance of a \$5,000,000 City of Dallas Airport Revenue Bond Issue, Series 401, without first having submitted a proposition to the qualified electorate, including Plaintiffs, to obtain authorization of such issue;
- (c) they propose to apply future revenues of Love Field to payment of bonds, without first having obtained authorization through the required statutory election;
- (d) they have distributed by United States Mail an official Notice of Sale of such Bond Issue, a Bid Form and Statement, without having enacted an ordinance authorizing the sale of such issue;
- (e) to induce the purchase of such bond issue, they have used the United States Mail to circulate false and fraudulent statements as to the authority of the City to issue such bonds, the revenues available to retire the debt created; the anticipated gross revenues, operating and maintenance expense at Love Field, the monies needed for the retirement of outstanding revenue airport bonds, the City's statutory and Constitutional debt limits, the present financial condition of the City of Dallas, and by implication the sources available for revenue bond retirement; said statement also contains representations by a City Official which are in excess of his authority and qualifications; all of which actions are in violation of U.S.C. Title 15, Section 77q, and the Federal Statutes prohibiting use of the mails to defraud.

[fol. 476]

17.

That by reason of the action complained of in the preceding paragraphs, Plaintiffs have been damaged through dissipation of the value of their homes; that if said action be consummated by issue of the bonds and the illegal construction of the proposed instrument runway, at Love

Field, Plaintiffs will be irreparably damaged by having their lives and health and the lives and health of their children placed in constant jeopardy, and their rights in property seized without compensation.

18.

That the action of the Defendants in their official capacities is arbitrary and capricious and designed to serve certain vested financial interests, contrary to public interest and public policy; that the financial condition of the City of Dallas is presently such that it cannot respond to Plaintiffs for the damages sustained as a result of said City's illegal action and the denial to Plaintiffs of equal protection of the laws.

Wherefore, Plaintiffs demand Judgment as follows:

I. That the Defendant City of Dallas and the Defendant elected and appointed officials of said City be permanently enjoined from making payments from City of Dallas revenues and/or funds on account of the indebtedness attempted to be created by outstanding City of Dallas Airport Revenue Bonds identified as Series 323, 352, 363, 364, 370, 371, 390 and 15;

II. that the City of Dallas and the Defendant Elected and appointed officials of said City be permanently enjoined from constructing a parallel instrument runway within the present limits of Love Field, Dallas, Texas.

[fol. 477] III. that the above named Defendants, with the exception of Troy C. Bateson, be permanently enjoined from circulating false information to induce the purchase of City of Dallas Airport Revenue Bonds, Series 401, and from all further action calculated to effect the sale of said issue;

IV. That the Defendant City of Dallas and the Defendant elected and appointed officials of said City be permanently enjoined from issuing Airport Revenue Bonds, Series 401, or any other Airport Revenue Bonds until such time as the issue of such bonds shall be approved as an election held in accordance with law;

V. That City of Dallas Airport Revenue Bonds, Series 323, 352, 363, 364, 370, 371, 390 and 15 are null, void and not a legal obligation of the City of Dallas, Texas; and that City of Dallas Airport Revenue Bonds, Series 401, if issued prior to a final determination of this action, be declared null, void, and not a legal obligation of the City of Dallas, Texas.

VI. that Plaintiffs recover their costs of suit, and have such other and further relief as they may be entitled to in the premises.

James P. Donovan, Attorney for Plaintiffs, 30½
Highland Park Shopping Village, Dallas 5, Texas.

[fol. 478] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

No. 9276 Civil

DANIEL C. BROWN, et al, Plaintiffs,

vs.

CITY OF DALLAS, et al, Defendants.

MOTION TO ADVANCE—Filed September 25, 1962

To the Honorable Judge of Said Court:

Come Now, the City of Dallas and all of the other Defendants in the above entitled and numbered cause, and by way of Motion to Advance would show to the Court as follows:

1.

This suit was filed by Attorney James P. Donovan on behalf of the Plaintiffs as taxpayérs of Dallas and property owners in the vicinity of Love Field, on the 24th day of September, 1962, in which they are seeking a permanent

injunction to enjoin the City of Dallas from issuing any revenue bonds for the building of a parallel runway at Love Field and also to enjoin the City of Dallas from paying out interest and maturities on previous Airport Revenue Bonds which the City of Dallas has issued and sold over a period of the last six years, which said bonds are now in the hands of holders in due course.

[fol. 479] The occasion for filing this suit was that the City of Dallas had advertised for bids for the sale of \$5,000,000 of revenue bonds for the purpose of constructing the parallel runway at Love Field, said bids to be received at 1:45 P.M. September 24, 1962, and the City of Dallas did receive such bids on said bonds from five syndicates with interest rates ranging from 3.61158 per cent to 3.99 per cent, and the City of Dallas in due course would sell such bonds on Wednesday, September 26, 1962.

That the purpose of this suit is to make it legally impossible for the City of Dallas to complete said sale and no immediate relief is asked for by the Plaintiffs in this suit.

2.

Furthermore, your Defendants would show to the Court that heretofore on April 3, 1961, the City of Dallas advertised, and thereafter received bids for the sale of \$8,000,000 of Airport Revenue Bonds to be issued and sold under the same law now under attack, and the said James P. Donovan, as attorney, filed suit on behalf of George S. Atkinson and others, as taxpayers and as a class suit, in a cause styled George S. Atkinson et al v. City of Dallas, in the 160th District Court of Dallas County, Texas, wherein they sought to enjoin the letting of the contract for the construction of a parallel runway at Love Field and the sale of the Airport Revenue Bonds, which said cause was tried first on an application for a temporary injunction, which was denied. Notice of appeal was given, but not perfected. Thereafter, the cause was transferred to the 44th District Court and tried on a motion for summary judgment on its merits, which resulted in judgment in favor of the City of Dallas and the power and authority to build the parallel runway and the validity of the bonds were upheld, from

which an appeal was prosecuted to the Court of Civil Appeals at Dallas, Texas, the appeal being filed on the last permissible day. Thereafter, the cause was advanced on the Docket upon petition of the City of Dallas, and the Court of Civil Appeals affirmed the judgment (353 S. W. 2d 275). Motion for rehearing then was filed on the last day, which was overruled, and a petition for writ of error was filed on the last day to the Supreme Court, which writ was refused, no reversible error, and the Court denied [fol. 480] the Petitioners the right to file a Motion for Rehearing.

Thereafter on the 89th day, Plaintiffs in said suit, filed a Petition for Certiorari to the Supreme Court of the United States, which was denied by the Supreme Court on the 23rd day of June, 1962. Petition for rehearing was filed, however, the subject matter of the validity of the bonds (which was a part of the subject matter of the original litigation) was abandoned in the motion for rehearing.

That this suit is also filed by Plaintiffs herein as a class and as taxpayers and property owners in the City of Dallas, and some of the parties in the previous suit are the same that are parties to this suit, at least 30 of them.

That the purpose of this suit, it is evident, is to cast a cloud upon the sale of these bonds and thus prevent the City of Dallas from executing and constructing a much needed improvement at Love Field—an airport of the City of Dallas; that the City of Dallas has received bids which are advantageous to the City and that unless this cause is disposed of promptly the City of Dallas will suffer irreparable financial loss and damage by not being able to sell and deliver said bonds because the plaintiffs have not furnished any security to which the City would have recourse in the event the City and the other Defendants herein are successful in this suit.

That from the foregoing it is evident that this cause should be heard as early as possible on its merits and determined and disposed of so that the City of Dallas can proceed with the public improvement in question. It is therefore suggested to this Honorable Court that this cause be advanced on the Docket of this Court and if convenient to

the Court that it be set down for hearing on Tuesday, October 2, 1962.

That Defendants Avery Mays, W. C. (Dub) Miller, Dallas Gordon Rupe, Herbert L. Nichols and Troy C. Bateson are all sued individually and as owners and holders of City of Dallas, Texas Airport Revenue Bonds. These parties are not the owners of any of the City of Dallas, Texas Airport Revenue Bonds, but are members of an Aviation Committee of the Dallas Chamber of Commerce and therefore they [fol. 481] are not representatives of holders of bonds, but are citizens of Dallas aiding the City of Dallas in the prosecution of the Airport Improvement Program.

Will Wilson, Attorney General of Texas, who is sued herein, has the duty of approving the issuance of revenue bonds and has authorized the undersigned attorneys to make an appearance for him in this action and cause.

Wherefore, Premises Considered, your Defendants respectfully pray that this Motion be granted and the cause be set down for a hearing at an early date.

Respectfully submitted,

H. P. Kucera, N. Alex Bickley, Attorneys for the
City of Dallas, et al, Defendants.

Service (omitted in printing).

[fol. 482] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS

No. 9276—Civil

DANIEL C. BROWN, et al., Plaintiffs,

vs.

CITY OF DALLAS, et al., Defendants.

DEFENDANTS' CITY OF DALLAS, ET. AL., MOTION TO
DISMISS AND ORIGINAL ANSWER—Filed October 12, 1962

Come Now the Defendants in the above entitled and numbered cause, and subject to the action of the Court of Civil Appeals for the Fifth Supreme District of Texas at Dallas in Cause No. 16193 entitled City of Dallas, et al, vs. Daniel C. Brown, et al, and without in any manner waiving their rights in the same, file this their Motion to Dismiss Plaintiffs' Complaint and their Original Answer herein, and would move this Court to dismiss Plaintiffs' Complaint for the following reasons, to-wit:

I.

There is no diversity of citizenship, and none is alleged in Plaintiffs' Original Complaint.

II.

There is no allegation or a showing of an amount in controversy in excess of the value of \$10,000.00, exclusive of the interests and costs, as is required by U.S.C. Title 28, Sec. 1331, as to each of them individually nor may they aggregate their damages to constitute the jurisdictional amount.

III.

There is no showing of a violation of any civil rights of the Plaintiffs under U.S.C. Title 28, Sec. 1343, for the rea-

son that the ground as alleged under this Section is the failure of the City of Dallas to submit the Airport Revenue Bond issues, to-wit: Series 323, 352, 363, 364, 370, 371, 383, 390 and 401, to a vote of the people so that the Plaintiffs as taxpayers could vote on the same, and wholly fails to state [fol. 483] any civil right to which the Plaintiffs as taxpayers, homeowners or as citizens are entitled to under the laws of the State of Texas or the Constitution of the State of Texas or of the United States, since the sale of same is authorized by Texas State Statute, Art. 1269-j, V.A.C.S. These being bonds strictly payable out of the Airport revenues, neither the statute nor any other law requires the vote of the people prior to their issuance, so there is no civil right to be enforced.

IV.

The complainants have no justiciable interest and are forbidden by law to contest the legality of the Revenue Bonds previously issued and outstanding as set forth in Paragraph 11 of their Complaint for the reason that Art. 1269j-5 of V.A.C.S. (State of Texas) provides that: "The bonds shall not be finally issued until approved by the Attorney General of Texas and registered by the Comptroller of Public Accounts of the State of Texas, and after such approval shall be incontestable", and said bonds according to the Complaint have already been sold and delivered and of necessity must have been approved by the Attorney General of the State of Texas and registered by the Comptroller of Public Accounts of the State of Texas.

V.

The issues attempted to be litigated under the allegations of this lawsuit are the same issues that were litigated by the same class against the City of Dallas in the case of *Atkinson, et al v. City of Dallas*, the opinion to which is reported in 353 S.W. 2d 275 (writ refused, n.r.e.) by the Supreme Court of the State of Texas and Petition for Writ of Certiorari refused by the Supreme Court of the United States on June 25, 1962, and pursuant to which a mandate has been issued by the Court of Civil Appeals for the Fifth Supreme

Judicial District of Dallas, Texas. Reference hereto is made to Plaintiffs' First Amended Original Petition in that case which was introduced in this Court by the complainants herein on their Application to Stay the State Court Proceedings and is attached as Exhibit "B" to the Defendants' Motion to Dismiss Plaintiffs' Application to Stay State Court Proceedings, which is hereby referred to and made a part hereof for all purposes. This shows on its face that the issues involved in that cause and the present cause [fol. 484] are the same, and that the parties in this cause would be bound by the judgment therein.

VI.

The Plaintiffs have wholly failed to allege a justiciable controversy as required by Art. 3, Sec. 2, of the Constitution of the United States, and said Petition shows on its face that as taxpayers they will be under no obligations to make any payments on these outstanding revenue bonds and the revenue bonds to be issued which are payable wholly from the receipts and revenues of Love Field, and because the same shows on its face that it is a mere attempt and request upon the part of the Plaintiffs to ask this Court to sit in judgment and advise on administrative action, and as such constitutes no justiciable controversy as required by Art. 3, Sec. 2, of the Constitution.

VII.

The Plaintiffs' Complaint shows on its face that the Plaintiffs have no justiciable interest under the provisions of U.S.C. Title 15, Sec. 77q, in that the criminal provisions of the statute, if any, are to be enforced by the U. S. District Attorney and the civil liability, if any, inures to the benefit of a good faith purchaser or one who has acted upon the representations made. The Plaintiffs are neither purchasers nor parties to the transaction involved in the sale of the bonds complained of or in the advertising for bids on the bonds, and as such are strangers to the transaction. In addition, the bonds are purely revenue bonds, not payable out of tax funds, and as taxpayers they are not parties to the transaction. Hence, there can be no civil

liability to the Plaintiffs herein as a matter of law. Even if all of the allegations made in their Complaint were true, which is not admitted, they are strongly denied.

Wherefore, these Defendants pray that said cause be wholly dismissed at Plaintiffs' costs with prejudice to the refiling of same or any part thereof, and that this cause [fol. 485] be concluded without delay.

Respectfully submitted,

H. P. Kucera, N. Alex Bickley, By H. P. Kucera,
Attorneys for City of Dallas, Earle Cabell, Elgin
B. Robertson, Charles S. Sharp, Carrie E. Welch,
Dr. R. A. Self, Joe G. Moody, Mrs. Elizabeth Bless-
ing, Walter H. Cousins, Jr., George M. Under-
wood, Jr., Elgin E. Crull, Harold G. Shank, E.
Lynn Crossley, George P. Coker, Jr., H. P. Kucera,

Will Wilson, By Howard Mays, Attorney General
for the State of Texas,

McCall, Parkhurst, Crowe, McCall & Horton, By
Millard Parkhurst, Attorneys for Themselves and
for Almon & McKinney, Inc. and Troy C. Bateson,

Ritchie, Ritchie & Crosland, By R. A. Ritchie, At-
torneys for Dallas Gordon Rupe,

Carrington, Johnson & Stephens, By Paul Carrington,
Attorneys for Rauscher, Pierce & Co., Inc.,
Avery Mays, W. C. (Dub) Miller, Herbert L.
Nichols.

[fol. 486] Come Now the Defendants in the above entitled and numbered cause, and subject to their Motion to Dismiss herein, and without waiving their rights in Cause No. 16193 now pending before the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, filed this their Original Answer and Reply to Plaintiffs' Original Complaint, and would show the Court as follows:

I.

As to the allegations in Plaintiffs' Original Complaint, these Defendants answer as follows:

(A) Paragraph 2 is not admitted because these facts are unknown to the Defendants, but are well known to the Plaintiffs.

(B) Paragraph 3 through 8, inclusive, are admitted.

(C) Paragraph 9 is denied insofar as the said Avery Mays, W. C. (Dub) Miller, Dallas Gordon Rupe, and Herbert L. Nichols and Troy C. Bateson being owners and holders of the City of Dallas Airport Revenue Bonds.

(D) Paragraph 10 is admitted but is immaterial herein because no bonds were issued under that provision of the State statute.

(E) Paragraph 11 is denied insofar as it alleges that the acts of the City of Dallas were illegal, wrongful or in violation of the provisions of any of the State statutes or existing law and insofar as it states that the bonds were wrongfully issued without submitting them to the taxpayers as required by said Act because the Act under which they were issued did not require their submission to a vote of the people. The factual information insofar as the bonds themselves are concerned is correct with the exception that the Series issued June 1, 1959 is Series 383 instead of 15.

(F) Paragraph 12 is admitted insofar as it alleges the issuance and payment of the Airport Revenue Bonds under Art. 1269j-5 of the Texas Revised Civil Statutes, but denies that this statute or its application is unconstitutional or void in any respect.

(G) Paragraph 13 is admitted insofar as the past and future payment of the bonds is concerned, but denied insofar as the allegations that the bonds are void.

(H) Paragraph 14 is denied, except insofar as the allegation that the proceeds of the bonds have been used on the Love Field Airport.

(I) Paragraph 15 is denied.

[fol. 487]

(J) Paragraph 16 is denied insofar as to any conspiracy is concerned and insofar as deprivation of either directly

or indirectly in any manner of the equal protection of the laws and of the equal privileges under the law to any of the Plaintiffs, but state that any acts that have been done as concerns Love Field have been done in good faith for the benefit of the citizens of Dallas. In this connection Defendants deny that the additional runway at Love Field will be in violation of any statute or regulation or that they have circulated any false or fraudulent statements through the United States mail or to induce the purchase of any bonds, or that the Plaintiffs have been damaged in their properties, their lives or their health, or that their properties have been seized without compensation.

(K) Paragraph 18 is denied.

II

By way of further answer herein, these Defendants would show the Court that the matters complained of in Plaintiffs' Petition have been fully adjudicated by the State Court of Texas in suit originally instituted in the 160th Judicial District Court of Dallas County, Texas, Cause No. 59027-B, on April 3, 1961, styled *George S. Atkinson, et al v. City of Dallas*:

That upon trial of said cause on a Motion for Summary Judgment the trial court entered a judgment in favor of the City of Dallas, from which an appeal was duly prosecuted to the Court of Civil Appeals of the Fifth Supreme Judicial District of Texas, where the cause was docketed as No. 16028, styled, *George S. Atkinson, et al v. City of Dallas*. In due course of time, the cause was heard by said court on arguments and written brief, and the judgment of the trial court was affirmed in an opinion rendered by the Court published in 353 S.W. 2d 275. Thereafter an Application for Writ of Error was made to the Supreme Court of Texas, which was refused, no reversible error; and thereafter a Petition for Certiorari was presented to the United States Supreme Court, and said Petition was denied by the Supreme Court on June 25, 1962; and a Motion for Rehearing was overruled on October 8, 1962. Without burdening or lengthening this pleading in support of its Plea of Res Adjudicata, the City of Dallas hereby incorporates as part

of its pleading the record made of the evidence on a hearing in ancillary proceedings in this cause heard by this [fol. 488] Court, sitting at Wichita Falls on October 10, 1962, on an Application for Injunction to restrain the Court of Civil Appeals for the Fifth Supreme Judicial District and the Petitioners (Defendants herein) in Cause No. 16193, styled City of Dallas v. Brown, et al, which proceeding is in the nature of a prohibition to prohibit the Plaintiffs in this cause (Respondents therein) from further litigating the matters complained of herein, as the same have been fully adjudicated by the Courts of the State of Texas.

Wherefore, Premises Considered, these Defendants pray, that the Plaintiffs be denied any injunctive relief, and that the City of Dallas Airport Bonds be declared to be a valid and legal obligation of the City of Dallas, and for costs of suit and for such other relief as these Defendants may show themselves entitled to in the premises.

Respectfully submitted,

H. P. Kucera, N. Alex Bickley, By H. P. Kucera,
Attorneys for City of Dallas, Earle Cabell, Elgin
B. Robertson, Charles S. Sharp, Carrie E. Welch,
Dr. R. A. Self, Joe G. Moody, Mrs. Elizabeth Bless-
ing, Walter H. Cousins, Jr., George M. Under-
wood, Jr., Elgin E. Crull, Harold G. Shank, E.
Lynn Crossley, George P: Coker, Jr., H. P. Kucera,

Will Wilson, By Howard Mays, Attorney General
for the State of Texas,

McCall, Parkhurst, Crowe, McCall & Horton, By
Millard Parkhurst, Attorneys for Themselves and
for Almon & McKinney, Inc. and Troy C. Bateson,

Ritchie, Ritchie & Crosland, By R. A. Ritchie; At-
torneys for Dallas Gordon Rupe,

Carrington, Johnson & Stephens, By Paul Carrington,
Attorneys for Rauscher, Pierce & Co., Inc.,
Avery Mays, W. C. (Dub) Miller, Herbert L.
Nichols.

[fol. 489]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

No. 9276 Civil

DANIEL C. BROWN, et al, Plaintiffs,

vs.

CITY OF DALLAS, et al, Defendants.

DEFENDANTS CITY OF DALLAS ET AL SUPPLEMENTAL MOTION
TO DISMISS—Filed April 24, 1963

To the Honorable United States District Court:

Come Now the Defendants in the above entitled and numbered cause and with leave of Court first had and obtained, files this their Supplemental Motion to Dismiss, supplementing their Original Motion to Dismiss and Original Answer previously filed herein, and still insisting upon the same, move this Court to dismiss Plaintiffs' complaint for the additional following reasons, to-wit:

I.

The Supreme Court of Texas, in cause number A-9340, being an Original Mandamus suit filed by these Defendants against the Honorable Dick Dixon as Chief Justice and the other Justices of the Court of Civil Appeals for the Fifth Judicial District sitting at Dallas and all of the Plaintiffs herein and their attorney of record, styled *City of Dallas, et al, Relators, vs. Honorable Dick Dixon, Chief Justice, et al, Respondents*, did issue an Original Mandamus directed to the said Court of Civil Appeals. The opinion expressly found that the issues sought to be litigated in this cause, are the same issues that were litigated, or should have been litigated in the cause of *Atkinson et al vs. City of Dallas*, 353 SW 2d 275, that the prayer for ultimate relief is the same, that the parties are the same, and therefore,

this suit is foreclosed by the Judgment in that case. The Court then requested the Court of Civil Appeals to grant [fol. 490] writs necessary for the enforcement of its Judgment in *Atkinson et al vs. City of Dallas*. This opinion was delivered March 13, 1963, and is attached hereto as Exhibit "A" and made a part hereof for all purposes. The Supreme Court subsequently issued a letter dated April 10, 1963, and a Supplemental Opinion taxing costs, which is attached hereto as Exhibit "B" and made a part hereof for all purposes.

II.

Subsequent to the Opinion of the Supreme Court, the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas in cause number 16,193, styled City of Dallas et al, Petitioners, vs. Daniel C. Brown, et al, Respondents, on the 16th of April, 1963, issued its Writ of Prohibition and Ancillary Orders which is attached hereto as Exhibit "C" and made a part hereof for all purposes.

III.

These instruments on their face show that the Plaintiffs have no justiciable interest and that the matter sought to be litigated herein has been foreclosed by previous litigation; hence, no justiciable controversy is alleged or can be alleged.

Wherefore These Defendants Pray that said cause be wholly dismissed at Plaintiffs' cost with prejudice to re-filing the same or any part thereof, and that this cause be concluded without delay.

Respectfully submitted,

H. P. Kueera, N. Alex Bickley, Waggoner Carr, McCall, Parkhurst, Crowe, McCall & Horton, Ritchie, Ritchie & Crossland, Carrington, Johnson & Stephens, By N. Alex Bickley, Attorneys for Defendants.

[fol. 491]

EXHIBIT "A" TO SUPPLEMENTAL MOTION TO DISMISS

IN THE SUPREME COURT OF TEXAS

A-9340

CITY OF DALLAS, ET AL,

Relators

v.

HONORABLE DICK DIXON CHIEF JUSTICE, ET AL,

Respondents

ORIGINAL MANDAMUS

When irrelevant and immaterial matters are eliminated from this direct proceeding in this Court, only two ultimate questions remain for determination: 1. Has this Court jurisdiction to issue a writ of mandamus to a Court of Civil Appeals requiring it, in a proper case, to issue all writs necessary to prevent prosecution of a suit in which the plaintiffs, bound by a prior judgment of the Court of Civil Appeals, seek to relitigate issues which were determined by the prior judgment? 2. If so, does the record before us present a case in which our jurisdiction to issue the writ of mandamus should be exercised?

The City of Dallas and its officials filed a proceeding in the Court of Civil Appeals for the Fifth Supreme Judicial District, sitting at Dallas, in which they sought the issuance of a writ of prohibition to prohibit the prosecution by the plaintiffs and their attorney of Civil Action No. 9276, styled Daniel C. Brown, et. al. v. City of Dallas, et. al., pending on the docket of the United States District Court for the Northern District of Texas, Dallas Division, and to direct their dismissal of the case. The writ of prohibition was sought on the ground that the plaintiffs in Brown v. City of Dallas are attempting to relitigate issues determined by a final judgment of the Court of Civil Appeals for the Fifth District in Atkinson, et. al. v. City

of Dallas, et. al., 353 S.W.2d 275, writ refused, no reversible [fol. 492] error. The Court of Civil Appeals denied the relief sought 362 S.W.2d 372. The court's judgment is not reviewable by appeal or writ of error. *City of Houston v. City of Palestine*, 114 Tex. 306, 267 S.W. 663.

The City of Dallas and its officials now seek a writ of mandamus from this Court directing the Court of Civil Appeals for the Fifth District, and the individual Justices of that court, to issue a writ of prohibition as there prayed for.

Before discussing the two questions posed at the beginning of this opinion, we dispose of two matters which we regard as irrelevant and immaterial.

Respondents urge that relators are not entitled to relief from the Court of Civil Appeals because they seek relief only against the plaintiffs and their attorney in *Brown v. City of Dallas* and ask only for a writ of prohibition; that writs of prohibition issue to courts and not to litigants. Technically speaking, that is correct, *City of Houston v. City of Palestine*, 114 Tex. 306, 267 S.W. 663; *Lowe and Archer, Injunctions and Other Extraordinary Remedies*, p. 482, § 511; *High, A Treatise on Extraordinary Legal Remedies*, pp. 603-604, § 762; 42 Am. Jur. 139-140, 150-151, *Prohibition*, §§ 2, 3, 11, although the true function of the writ is often overlooked. See *Humble Oil & Refining Co. v. Fisher*, 152 Tex. 29, 253 S.W.2d 656. However, incorrect identity of the writ sought is of no significance. Relators seek from the Court of Civil Appeals a writ directing the plaintiffs and their attorney to desist from further prosecution of *Brown v. City of Dallas* in the United States District Court. If they are entitled to that relief, necessary and proper writs, by whatever names they may be called, should be issued.

Relators suggest in their brief that inasmuch as this Court refused writ of error, no reversible error, in *Atkinson v. City of Dallas*, the judgment of the Court of Civil Appeals in that case is a judgment of this Court which this Court may enforce by issuing writs to the plaintiffs and their attorney in *Brown v. City of Dallas*. The judgment of the Court of Civil Appeals in *Atkinson v. City of Dallas* is not a judgment of this Court. A judgment

of a Court of Civil Appeals becomes a judgment of this Court when writ of error is granted for review of the judgment and it is affirmed. *Houston Oil Co. of Texas v. Village Mills Co.*, 123 Tex. 253, 71 S.W.2d 1087. But when writ of error for review of a Court of Civil Appeals' judgment is "Refused" or "Refused, No Reversible Error," this Court simply refuses to grant writ of error for the purpose of reviewing the judgment. *City of Palestine v. City of Houston*, Tex. Civ. App., 262 S.W. 215, 220, writ dismissed, 267 S.W. 663.

We now consider whether this Court has jurisdiction to issue a writ of mandamus to a Court of Civil Appeals requiring it, in a proper case, to issue all writs necessary to prevent prosecution of a suit in which the plaintiffs, bound by a prior judgment of the Court of Civil Appeals, seek to relitigate issues which were determined by the prior judgment.

It is clear that the Supreme Court has jurisdiction to issue a writ of mandamus to a Court of Civil Appeals to compel it to perform a mandatory duty. *Simpson v. McDonald*, 142 Tex. 444, 179 S.W.2d 239. Jurisdiction is conferred by Article 1733¹ which authorizes the Supreme Court in original proceedings to issue "writs of . . . mandamus agreeable to the principles of law regulating such writs, against any district judge, or Court of Civil Appeals or judges thereof, . . ." Legislative authority for enactment of the statute is found in Sec. 3, Art. V of the Constitution. [fol. 494] Sec. 6, Art. V. of the Constitution confers jurisdiction in particular matters on the Courts of Civil Appeals, and provides: "Said Courts shall have such other jurisdiction, original and appellate as may be prescribed by law." By the enactment of Art. 1823 the Legislature has provided: "Said courts, [Courts of Civil Appeals] and the judges thereof may issue writs of mandamus and all other writs necessary to enforce the jurisdiction of said courts." Interference with enforcement of a court's judgment is interference with its jurisdiction, and the quoted constitutional

¹ All Article references are to Vernon's Annotated Texas Civil Statutes.

and statutory provisions confer jurisdiction on Courts of Civil Appeals to issue whatever writs are necessary, including the writ of injunction, to enforce their judgments. *Long v. Martin*, 116 Tex. 135, 287 S.W. 494; *Cattlemens Trust Co. of Fort Worth v. Willis*, Tex. Civ. App., 179 S.W. 1115; *Nash v. Hanover Fire Ins. Co.*, Tex. Civ. App., 79 S.W. 2d 182. But recognition that such jurisdiction exists does not furnish a complete answer to our problem.

Conferral of jurisdiction on a court to do a given act invests it with power to do the act, *Morrow v. Corbin*, 122 Tex. 553, 62 S.W.2d 641; but whether the act is to be done may be either discretionary or mandatory. When exercise of the power is discretionary, its exercise may not be compelled by a superior court. When exercise of the power is mandatory, it may and should be compelled. It follows that whether this Court may and should issue a writ of mandamus to a Court of Civil Appeals to compel it to enforce one of its judgments must turn on whether enforcement of the judgment is merely a discretionary right or is a mandatory duty of the court.

Generally speaking, enforcement of a judgment by the court which renders it, trial or appellate, is a duty. If a [fol. 495] judgment is not enforced, the successful litigant has accomplished nothing; he has his victory but is denied its fruits. Judgments are rendered for the purpose of settling disputes between the parties to it; they are not to be nullified by either passive nonobservance or active interference. This does not mean, however, that it is the duty of an appellate court to exercise its original jurisdiction to enforce its judgments in every case. When an adequate remedy is otherwise available to a holder of rights under an appellate court judgment, the court which rendered it may, in its discretion, decline to exercise its original jurisdiction.

One in whose favor an appellate court judgment has been rendered has an adequate remedy to bar a second suit which seeks only to relitigate the issues between the parties, or their privies, and which does not otherwise interfere with enforcement of the prior judgment or with the rights of the parties springing from it. The remedy lies in the trial court in the defensive plea of res judicata; and the fact that

the holder of rights under the prior judgment may be put to some trouble, delay and expense in defending the second suit does not render his remedy so inadequate as to require intervention by the appellate court through exercise of its original jurisdiction to enforce its judgment in the first suit. Milam County Oil Mill Co. v. Bass, 106 Tex. 260, 163 S.W. 577; Brazos River Conservation and Reclamation Dist. v. Belcher, 139 Tex. 368, 163 S.W.2d 183; Iley v. Hughes, 158 Tex. 362, 311 S.W.2d 648. If the rule were otherwise, the defense of res judicata to suits in trial courts would soon be abandoned in all instances involving appellate court judgments in favor of original proceedings in our appellate courts. The Supreme Court and Courts of Civil Appeals are primarily courts of review, and there is nothing in the [fol. 496] constitutional and statutory provisions, or in our decisions, requiring them to exercise original jurisdiction to enforce their judgments when the same relief may be obtained relatively as expeditiously and inexpensively in the trial courts.

We should recognize, however, that a plea of res judicata as a defense to a second suit is not an adequate remedy for one holding rights under an appellate court judgment when an actual interference with enforcement of the judgment is coupled with the second suit, or when the mere filing and prosecution of the suit destroys the efficacy of the judgment. In such instances we conceive it to be the duty, as well as the right, of the appellate court to exercise its original jurisdiction to enforce its judgment.

The Supreme Court and the various Courts of Civil Appeals have been prompt to discharge their duty to prohibit the prosecution of suits in which actual interference with enforcement of their judgments has been accomplished through ancillary writs issued by trial courts. Crouch v. McGaw, 134 Tex. 633, 138 S.W.2d 94; Cattlemens Trust Co. of Fort Worth v. Willis, Tex. Civ. App., 179 S.W. 1115; Nash v. McCallum, Tex. Civ. App., 74 S.W.2d 1046; Browning-Ferris Machinery Co. v. Thomson, Tex. Civ. App., 55 S.W.2d 168; Life Ins. Co. of Virginia v. Sanders, Tex. Civ. App., 62 S.W.2d 348. They have also been prompt to discharge their duty to prohibit the prosecution of suits which cloud title to real property when title has been settled by

their prior judgments. *Houston Oil Co. of Texas v. Village Mills Co.*, 123 Tex. 252, 71 S.W.2d 1087; *Rio Bravo Oil Co. v. Hebert*, 130 Tex. 1, 106 S.W.2d 242; *Continental State Bank of Big Sandy v. Floyd*, 131 Tex. 388, 114 S.W.2d 530; [fol. 497] *Humble Oil & Refining Co. v. Fisher*, 152 Tex. 29, 253 S.W.2d 656; *Yount-Lee Oil Co. v. Federal Crude Oil Co.*, Tex. Civ. App., 92 S.W.2d 493. It is obvious that in the latter type of case the mere filing and prosecution of the suit destroys the efficacy of the prior judgment.

There are instances in which the Supreme Court and the Courts of Civil Appeal have exercised their original jurisdiction to enforce their judgments by prohibiting the prosecution of second suits involving the same parties and issues when they were under no duty to do so. In most of such instances there was a taint of flagrant disregard of the appellate court judgment or an element of harassment and vexatious litigation. See *Hovey v. Shepherd*, 105 Tex. 237, 147 S.W. 224; *Conley v. Anderson*, Tex. Sup. 164 S.W. 985; *Sparenberg v. Lattimore*, 134 Tex. 671, 139 S.W.2d 77; *Nash v. Hanover Fire Ins. Co.*, Tex. Civ. App., 79 S.W.2d 182; *Haskell National Bank of Haskell v. Ferguson*, Tex. Civ. App., 155 S.W.2d 427; *National Surety Corp. v. Jones*, Tex. Civ. App., 158 S.W.2d 112; *Ferguson v. Ferguson*, Tex. Civ. App. 189 S.W.2d 442; *City and County of Dallas v. Cramer*, Tex. Civ. App., 207 S.W.2d 918. In some reported instances there has been a declination to exercise jurisdiction to enforce prior judgments by prohibiting the prosecution of second suits when there was no duty to do so. *Milam County Oil Mill Co. v. Bass*, 106 Tex. 260, 163 S.W. 577; *Brazos River Conservation and Reclamation Dist. v. Belcher*, 139 Tex. 368, 163 S.W.2d 183. Declination is not usually reflected in a reported opinion; it is evidenced by an order denying permission to file an application for extraordinary writs.

We have written at some length on the first question in an effort to harmonize prior decisions and to delineate for [fol. 498] bench and bar the situations in this area in which the issuance of extraordinary writs by appellate courts to enforce their judgments is discretionary and those in which issuance of such writs is a duty. We recognize that what we have said and held is, to some extent, in conflict with

statements in other opinions. In *Milam County Oil Mill v. Bass*, 106 Tex. 260, 163 S.W. 577, 578, we said that this Court was *without jurisdiction* to issue extraordinary writs to enforce its judgment when the only purpose of the writs was to prevent the prosecution of a suit "which makes no attempt to obstruct its [the judgment's] execution, but denies its conclusiveness upon what is alleged to be another cause of action." In *Houston Oil Co. v. Village Mills Co.*, 123 Tex. 253, 71 S.W.2d 1087, 1089, although attempting to distinguish *Bass*, we said that this Court had jurisdiction to issue such writs as were necessary to enforce its judgment by prohibiting the prosecution of a second suit between the same parties, or their privies, if the second suit "directly involves the relitigation of rights established by the judgment, and is of such a nature that, if successfully prosecuted, will result in a judgment which will purport the divesting of those rights." In neither case did we deal with the problem discussed here, that is, whether the exercise of jurisdiction, once conceded, is discretionary or mandatory.

It is difficult to conceive of a case between the same parties and directly involving relitigation of rights established by a judgment, which, if successfully prosecuted, would not result in a judgment purporting the divesting of those rights. Even a take-nothing judgment in a personal injury damage suit would establish the right of the defendant not to pay; and a suit by the plaintiff to relitigate the issues, if successful, would result in a judgment divesting that right. We consider *Village Mills* and other cases, cited above, [fol. 499] subsequent in point of time to *Bass*, to establish jurisdiction of this Court and the Courts of Civil Appeals to issue all writs necessary to prevent prosecution of a suit in which the plaintiffs, bound by a prior judgment of the court, seek to relitigate issues which were determined by the prior judgment. And we hold, further, that exercise of such jurisdiction is mandatory when an actual interference with enforcement of the judgment is coupled with the second suit or when the mere prosecution of the suit destroys the efficacy of the judgment.

Under the rule here announced, if *Brown v. City of Dallas*, now pending in the United States District Court, is, as relators allege, an effort by parties bound by the judgment in *Atkinson v. City of Dallas* to relitigate the issues finally determined by the Court of Civil Appeals in that case, it is the duty of the Court of Civil Appeals to enjoin further prosecution of *Brown v. City of Dallas*. At issue is the validity of certain revenue bonds, known as Love Field Revenue Bonds, sought to be issued and sold by the City of Dallas, and the use of funds derived from the sale for improvement of airport runways at Love Field. If the judgment of the Court of Civil Appeals in *Atkinson v. City of Dallas* finally adjudicated the validity of the bonds and the right of the City of Dallas to expend funds derived therefrom for improvements at Love Field, the mere prosecution of any subsequent suit attacking the validity of the bonds and the right so to expend their proceeds, destroys the efficacy of that judgment. Under the provisions of Section 3, Article 1269j-5, the authorizing statute, revenue bonds of this type cannot be finally issued until approved by the Attorney General, and the Attorney General does not approve issuance as long as their validity is under attack in pending litigation. The mere filing and prosecution of the *Brown* suit is as effective to prevent enjoyment [fol. 500] of the rights fixed by the prior *Atkinson* judgment as an injunction to prevent sale of the bonds would be.

The Court of Civil Appeals denied the relief sought by relators on the ground that it had no jurisdiction to grant it. Therefore, that court did not reach the question of whether the plaintiffs in *Brown v. City of Dallas* were bound by the *Atkinson* judgment and were seeking to relitigate issues foreclosed by that judgment. We are convinced by an examination of the pleadings in the two cases that they are.

Forty-three persons joined as plaintiffs in filing and prosecuting *Atkinson v. City of Dallas*. The suit was filed as a class action. The plaintiffs alleged that they were resident taxpayers of the City and County of Dallas and owners of homes and real property therein. They stated that included in the class which they represented were "the

home owners, families and individuals who live, work, reside and attend schools, churches and other community centers in the area embraced within the approach areas of the planned runway," and that the persons constituting the class they represented numbered in the thousands making it impracticable to bring them before the Court. The plaintiffs sought a permanent injunction against issuance of the Love Field Revenue Bonds and against the building of an extended runway at Love Field.

The petition in *Atkinson* tendered many reasons why the injunction sought should issue. We will not review them in detail. Generally, it was alleged that all state statutes which purported to authorize issuance of the bonds were unconstitutional and void; that the bonds themselves were void because (1) not authorized by vote of the qualified voters, (2) they created a debt of the City of Dallas with- [fol. 501] out compliance with constitutional requirements and in excess of that allowed by the charter of the City of Dallas, and (3) they constituted a lending of credit to individuals and corporations without the two-thirds vote of taxpayers required by Sec. 52, Art. III of the Constitution. Generally, it was alleged that the building of the runway violated Amendments V and XIV of the Constitution of the United States and Sec. 17, Art. I of the Constitution of Texas in that it would constitute a taking of their air-space without due process of law and denied them equal protection of the laws; that the proposed runway did not comply with Federal regulations as required by state statute; that the noise, smoke and danger from low-flying planes using the runway would disturb the quiet enjoyment of their properties and institutions, diminish the value of their properties and endanger their lives and health; that the establishment and use of the runway would create a public nuisance, and that the action of the City in constructing the runway was ultra vires and arbitrary.

All of these issues and all subsidiary issues raised by the pleadings but not here mentioned, as well as all issues which by diligence could have been raised and tried, were determined and foreclosed against the plaintiffs by the judgment of the Court of Civil Appeals affirming summary judgment against them in *Atkinson v. City of Dallas*. *Freeman v. McAninch*, 87 Tex. 132, 27 S.W. 97, 47 Am.

St. Rep. 79; *Ogletree v. Crates, Tex. Sup.*, 363 S.W.2d 431. The fact that this Court refused writ of error, "No Reversible Error," in *Atkinson* does not indicate otherwise. It is the judgment of the Court of Civil Appeals, not its opinion, which brings the rule of res judicata into play. The notation, "Writ Refused. No Reversible Error," casts not the slightest cloud on a judgment of a Court of Civil Appeals. [fol. 502] Rule 483, Texas Rules of Civil Procedure.

Respondents assert that the judgment in *Atkinson* is not res judicata of the issues in *Brown* because neither the parties nor the issues are the same.

Brown v. City of Dallas was filed by one hundred twenty-two persons, thirty of whom were plaintiffs in the *Atkinson* case. Others than the City of Dallas were made defendants, i.e., City officials, the Attorney General of Texas, certain securities dealers and their attorneys, and certain owners of bonds already sold. The suit does not purport to be a class action, but the plaintiffs are all described as "taxpayers of the City of Dallas, Texas, and the owners of homes situated within the approach areas of existing and proposed runways at Love Field."

It is immaterial that *Brown* is not a class action. The controlling fact is that *Atkinson* was a class action as authorized by Rule 42, Texas Rules of Civil Procedure; and being a class action of a hybrid type, the judgment in *Atkinson* binds all members of the class insofar as validity of the bonds and the right of the City to construct the runways are concerned if the class was adequately represented by those who sued on behalf of the class. McDonald, Texas Civil Practice, Vol. 1, § 3.37, pp. 283-284; *Hovey v. Shepherd*, 105 Tex. 237, 147 S.W.224. The description of the plaintiffs in *Brown*, quoted above, shows clearly that they are members of the class represented by the plaintiffs in *Atkinson*, and it is not suggested that they were not adequately represented in that suit. Their right to relitigate the same issues is foreclosed by our decision in *Hovey v. Shepherd*, supra. This must be so. If it were not so, different groups of Dallas citizens could halt all efforts of the [fol. 503] City to improve its airport facilities indefinitely by filing new suits. Such an absurdity cannot be tolerated.

An analysis of the petition in *Brown* discloses that the issues sought to be litigated are essentially the same as the

issues litigated in *Atkinson*, and the prayer is for the same ultimate relief. Such additional collateral issues as are injected in *Brown* could, by diligence, have been litigated in *Atkinson*. They are, therefore, also foreclosed by the judgment in *Atkinson*.

We conclude that it is the duty of the Court of Civil Appeals for the Fifth Supreme Judicial District to enforce its judgment in *Atkinson v. City of Dallas* by issuing whatever writs are necessary and effective to restrain the plaintiffs and their attorney in *Brown v. City of Dallas* from further prosecution of that suit. That action will no more invade or trench upon the jurisdiction of the United States District Court than did the injunction issued in *University of Texas v. Morris*, 162 Tex. 60, 344 S.W.2d 426. See also: *Moton v. Hull*, 77 Tex. 80, 13 S.W. 849; 28 Am. Jur. 737, *Injunctions*, § 229. The Court of Civil Appeals may not, however, order or direct dismissal of *Brown v. City of Dallas*. A suit cannot be dismissed from the docket of a court without an order of the court; and any writ directing dismissal of *Brown v. City of Dallas* would invade the jurisdiction of the United States District Court to control its own docket.

There is indication in the history of this matter that it has reached the point of vexatious and harassing litigation. If the Court of Civil Appeals concludes that other suits to relitigate the same issues may be filed by other members of [fol. 504] the class bound by the judgment in *Atkinson*, that court may, upon proper allegations and prayer, enjoin the filing of such suits by other members of the class.

We are satisfied that the Court of Civil Appeals will honor this opinion and will grant all necessary and proper writs for the enforcement of its judgment in *Atkinson v. City of Dallas*. Writ of mandamus will issue only if it should fail or refuse to do so.

Robert N. Calvert
Chief Justice

RWC:fh

Opinion delivered: MAR 13 1963

[fol. 505]

EXHIBIT "B" TO SUPPLEMENTAL MOTION TO DISMISS

THE SUPREME COURT OF TEXAS

AUSTIN

April 10, 1963

GEO. H. TEMPLIN
CLERK

ROBERT W. CALVERT
CHIEF JUSTICE
MEADE F. GRIFFIN
CLYDE E. SMITH
FRANK P. CULVER, JR.
RUEL C. WALKER
JAMES R. NORVELL
JOE GREENHILL
ROBERT W. HAMILTON
ZOLLIE STEAKLEY
ASSOCIATE JUSTICES

Hon. Dick Dixon, Chief Justice
Court of Civil Appeals
Records Building
Dallas, Texas

Dear Judge Dixon:

Re: City of Dallas et al. v.
Honorable Dick Dixon,
Chief Justice, et al.
No. A-9340.

The Supreme Court of Texas today overruled motion for rehearing in the above case, and the judgment of March 13, 1963, is now final. Therefore, in lieu of a formal writ of mandamus, we are sending to you herewith certified copies of the judgment and opinion of this Court in the case.

Will you please acknowledge receipt of these certified copies and advise us whether your Court will, or has, com-

plied with the provisions of the judgment and opinion of this Court.

Yours very truly,

GEO. H. TEMPLIN, Clerk

By /s/ CARL B. LYDA

cc. to:

Mr. H. P. Kucera, City Attorney
501 Municipal Bldg.
Dallas 1, Texas

Mr. James P. Donovan, Attorney
30½ Highland Park Shopping Village
Dallas 5, Texas

[fol. 506]

IN THE SUPREME COURT OF TEXAS

No. A-9340

March 13, 1963

City of Dallas et al.

vs.

Honorable Dick Dixon, Chief Justice, et al.

Original Mandamus

This cause came on to be heard on petition for writ of mandamus, filed herein on December 6, 1962, and the said petition together with the record and briefs and argument of counsel having been duly considered, because it is the opinion of the Court that the petition should be granted, and a writ of mandamus conditionally issued, it is therefore *adjudged, ordered and decreed* that unless the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas enforces its judgment in the case of George S. Atkinson et al. vs. City of Dallas, No. 16038 on the docket of said Court, by issuing whatever writs are necessary and effective, in accordance with the opinion of this Court

herein this day delivered, the Clerk of this Court will issue a peremptory writ of mandamus commanding, compelling and requiring said Court of Civil Appeals so to do.

It is further ordered that respondents, Paul A. Crick, Dr. Hobson Crook, George H. Harmon, James H. Parr, Martin E. Collis, Jr., J. W. Slaughter, James E. Strum, Floyd R. Raupe, George S. Atkinson, Vernon C. Pampell, Paul H. Crawford, E. T. Busch, V. C. Bilbo, W. H. Richardson, Austin Crow, J. O. Garrett, E. W. Quinton, Dr. Grant Boland, L. E. Dease, H. P. McDonald, M. J. Pellillo, J. D. Lowrie, S. R. Kirby, Charles Williamson, Jean Shaw, W. Claude Jones, James W. Odom, Reveau & Virginia Bassett, Walter Sodeman, Mr. & Mrs. O. L. Whitman, Mr. & Mrs. J. Walter Long, Jr., Mrs. Charles J. Butler, C. H. Asel, Lee R. Slaughter, Frank Grimes, Winston C. Jones, C. O. Crudgington, Daniel C. Brown, J. W. Tomlin, William Darrell Graves, George B. Letridge, Lloyd S. Carter and Arthur E. Tappan, and their attorney of record, James P. Donovan, jointly and severally, pay all costs in this proceeding in this Court, for which execution may issue.

(Opinion of the Court by Robert W. Calvert, Chief Justice).

[fol. 507]

EXHIBIT C TO SUPPLEMENTAL MOTION TO DISMISS

"Writ of prohibition and ancillary orders" in Case No. 16193 in the Court of Civil Appeals omitted from the record here as it appears at printed page 78, side folio 134 supra.

[fol. 511] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION
No. 9276—Civil

DANIEL C. BROWN et al., Plaintiffs,

vs.

CITY OF DALLAS et al., Defendants.

PLAINTIFFS ANSWER TO DEFENDANTS' MOTION AND
SUPPLEMENTAL MOTION TO DISMISS—Filed May 2, 1963

To Said Honorable Court:

Come now Plaintiffs in the above entitled and numbered cause and Answering Defendants' Motion and Supplemental Motion to Dismiss the Complaint herein, respectfully show this Court as follows:

1.

The Original Motion to Dismiss alleges in Paragraphs I and II thereof want of jurisdiction in this Court because of lack of diversity of citizenship and amount in controversy, neither of which is a jurisdictional requirement of the causes of action set forth in Plaintiffs' Complaint.

2.

Paragraph III of Defendants' Original Motion seeks dismissal on the theory that no violation of Plaintiffs' Civil Rights is alleged; Plaintiffs Complaint must for the purposes of this Motion be considered as true, and the argument of law advanced under this point can be pertinent only upon trial upon the merits.

3.

[fol. 512] Paragraphs IV, V, VI and VII of Defendants Original Motion involve matters outside the pleadings to which the Motion is addressed and should be excluded by the Court from consideration of said Motion.

4.

Defendants' Supplemental Motion to Dismiss was served on Counsel for Plaintiffs on Wednesday April 24, 1963, less than ten days before the date set for hearing of said Motion; said Supplemental Motion is predicated on matters extraneous to the pleading under attack, and are immaterial and irrelevant to the issues involved in the case at bar; the material submitted in said Supplemental Motion should be stricken from the record and dismissed from consideration in determination of Defendants' Motions to Dismiss.

Wherefore, Plaintiffs pray that Defendants' Motion and Supplemental Motion to Dismiss the Complaint herein be in all respects denied after entry by this Court of an Order excluding extraneous material to the pleadings in determination of said Motions; in the alternative

Plaintiffs pray that if the extraneous matter be not excluded from consideration as herein prayed for that an Order be made stating the Court's election to consider Defendants' Motions as Motions for Summary Judgment and granting Plaintiffs a reasonable opportunity to present all material made pertinent to such a Motion by Rule 56 of the Federal Rules of Civil Procedure.

Respectfully submitted,

James P. Donovan, Attorney for Plaintiffs, 30½
Highland Park Shopping Village, Dallas 5, Texas.

[fol. 513] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
No. 9276 Civil

DANIEL C. BROWN, et al

vs

CITY OF DALLAS, et al

Transcript of Proceedings—May 2, 1963

Be It Remembered that on the 2nd day of May, 1963, before the Honorable Sarah T. Hughes, United States District Judge, and without a Jury, the following proceedings were had in the above styled and numbered cause:

APPEARANCES:

Mr. James P. Donovan, Dallas, Texas, For the Plaintiffs.

Mr. H. P. Kucera, City Attorney, City of Dallas, Texas,
By: Mr. N. Alex Bickley,

Mr. Will Wilson, Attorney General of the State of Texas,
By: Mr. Howard Mays,

McCall, Parkhurst, Crowe, McCall & Horton, Dallas,
Texas, By: Mr. Millard Parkhurst, For the Defendants.

[fol. 515]

Proceedings

The Court: *Brown* versus the *City of Dallas*.

I believe we are here on your Motion, Mr. Bickley.

Mr. Bickley: On a Motion to Dismiss, Your Honor.

The Court: Yes. Do you wish to present it?

PLAINTIFFS' MOTION TO DROP CERTAIN PARTIES PLAINTIFF
AND TO ADD NEW PARTIES PLAINTIFF

Mr. Donovan: If the Court please, I have two matters which I think are preliminary to the hearing on the Motion, which probably should be considered by the Court before we go into that information.

The Court: All right, what are they?

Mr. Donovan: One is a Motion filed with this Court for permission to drop certain parties-plaintiff and to add new parties-plaintiff, and that Motion is before the Court, and I respectfully ask the Court to permit me to submit an Order approving the addition of these.

The Court: Will you state who they are?

Mr. Donovan: Yes, ma'am. The plaintiffs who wish to withdraw from the action are Faye Richardson, Charles Williamson, Jerry Williamson, E. W. Quinton, Geneva Quinton, Dorothy Boland, Arthur G. Rudkin, Helen Rudkin, Arthur E. Tappan, Bettie Tappan, E. Gardner Clapp, Stella Clapp, Jack H. Broom, Jane Broom, George B. Lotridge, Browning Lotridge, Lometta McDonald, J. D. Lowrie, Jr., Lillian Lowrie, Anna Marie Pyland, Calvin Pyland, Lewis A. Park, Lola E. Park, S. A. Myrick, Dorothy Lusk Myrick, Robert L. Brackett, Juanita Isom, E. T. [fol. 516] Cramer, S. R. Kirby, Jean Shaw, C. D. Crudgington, Harriet G. Crudgington, J. O. Garrett, Amy Ross Garrett, Paul Short, Besa Fairtrace Short, Arthur B. MacKinstry, III, June C. MacKinstry—

The Court: One minute. I now have a copy of the Motion, and have you had a copy?

Mr. Bickley: We have a copy, Your Honor.

The Court: You have no objection to their being given permission to withdraw, do you?

Mr. Bickley: No objection.

The Court: And, do you have any objection to the certain persons being given permission to intervene?

Mr. Bickley: We have no objection, Your Honor, if these people have been advised that there is a Writ of Prohibition that has been issued out of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas which may place them in contempt of court in intervening in this lawsuit.

The Court: Mr. Donovan, have you so advised your clients?

Mr. Donovan: Your Honor, I have not only advised them, I have submitted it to them in writing that they are exposing themselves to the risk of fine and imprisonment, and I have their signatures on the statement as to what their risk is.

The Court: Then, I judge that you have no objection, Mr. Bickley?

[fol. 517] Mr. Bickley: We have no objection under those circumstances, Your Honor.

The Court: All right, I'll sign the Order, Mr. Donovan, if you have them.

Mr. Donovan: Then, I would in connection with this proceeding, like to note my appearance in behalf of the remaining Plaintiffs after deletion of the ones named in the Order.

The Court: All right.

STATEMENT RE PERTINENT DOCUMENTS—RULE 56

By Mr. Donovan:

And then, I would urge the Court to consider prior to argument on the Motion to Dismiss, our Motion contained in our Answer, which requests this Court to exclude from consideration all matters contained in the original Motion to Dismiss and the Supplemental Motion to Dismiss, which are extraneous to the pleadings under attack; and in the event that request is denied, then, I would like the Court to comply with the provisions of Federal Rule 12 and give us a period of time in which we can submit documents pertinent to the Motion under Rule 56.

That's in accordance with the provisions of Rule 12 of the Rules of Federal Procedure, and I will read, with the Court's permission the pertinent part:

"If, on a motion asserting the defense numbered (6)"—which includes the dismissal for failure to state a claim—"to dismiss for failure of the pleading to state a claim upon [fol. 518] which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall

be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

I don't think there's much question but what the Supplemental Motion and at least four matters in the original Motion are extraneous to the pleadings.

For that reason, I would request that if the Court wants to take those matters under consideration, to enter an Order stating the plans to do so, and that the Motion will be considered as a Motion for Summary Judgment, and then I would request two weeks postponement to give me the opportunity to file answering affidavits, and possibly to make a Cross-Motion for possible Summary Judgment.

REPLY RE PERTINENT DOCUMENTS

By Mr. Bickley:

If it please the Court, in answer to the contention that has just been made by Counsel, we claim that the matters are not extraneous, but they are matters of which this Court may take judicial knowledge and should take judicial knowledge. They are matters that are before the Court; they are matters that are part of the records of this Court; and therefore the Court can act upon the Motion to Dismiss, and Counsel had knowledge of this before, when this [fol. 519] setting was actually made.

The Court: I would like you to take up his Answer to Defendant's Motion and Supplemental Motion to Dismiss, if you would, and discuss it.

REPLY RE PLAINTIFFS' ANSWER TO DEFENDANTS' MOTION AND SUPPLEMENTAL MOTION TO DISMISS

By Mr. Bickley:

Yes, ma'am, I'll be glad to.

In his Answer to our Motion and Supplemental Motion to Dismiss, which he just now handed to us, or just a few minutes ago handed to us, he states first that the Original Motion to Dismiss, alleges in Paragraphs I and II thereof, for want of jurisdiction due to "lack of diversity of citizenship", and "an amount in controversy".

He states that these are not jurisdictional requirements in this particular case. We can assume for the minute that they are not jurisdictional requirements, and take up the balance of it, and I think the Court will see what we're talking about.

Paragraph II of Defendants' Original Motion seeks dismissal on the theory that no violation of Plaintiffs' civil rights is alleged. Plaintiffs' complaint for the purposes of this Motion be considered as true, and the argument of law advanced under this point can be pertinent only upon trial of the matter.

Now, we take issue with that because this Court has a right to take judicial knowledge of what the law is, and the law in the State of Texas is that they have no right to [fol. 520] vote upon these bonds because they are purely revenue bonds, and since they have no right to vote upon them, there can be no civil right that has actually been contravened in this particular case. It was so held in the *Atkinson* case as well as others.

Mr. Donovan: Excuse me, if the Court please, I would like to intervene. There is a large disagreement on the holding in the *Atkinson* case, and I don't want to get into a discussion of that, and my contention is that it's not pertinent to this argument today.

The Court: Well, I don't want any legal argument at this time.

Mr. Donovan: Thank you.

Mr. Bickley: He says Paragraphs IV, V, VI and VII of Defendants' Original Motion involve matters outside the pleadings to which the Motion is addressed, and should be excluded by the Court from consideration of the Motion. The matters that he is referring to in Paragraphs IV, V, VI and VII are, in the first place, the matter of a statute, which is Article 1269, j-5 of the Vernons Annotated Statutes, which we think the Court certainly has a right to consider on such Motion.

Number V is the reported case of *Atkinson* versus the *City of Dallas*, in 353 S.W. 2d, page 275.

Number VI is Article 3, Section 2 of the Constitution.

[fol. 521] Number VII is U.S.C. Title 15, Section 77 q, under which his pleadings were brought, and we think the Court certainly has a right to consider these matters.

The Court: Mr. Bickley, may I ask you whether your Supplemental Motion deals entirely with the court proceedings?

Mr. Bickley: It deals entirely with reported decisions or decisions to be reported by the Courts.

The Court: Do you have any objection to taking up only your Supplemental Motion rather than considering the other Motion?

Mr. Bickley: All right, I certainly will, Your Honor.

The Court: I want to see if we agree.

I will confine this hearing, Mr. Donovan, to his Supplemental Motion and will not consider the matters which are contained in his Original Motion.

Mr. Donovan: Well, Your Honor, now that's one of the things that I'm directing my Motion to.

The Court: I know you are, but I am now explaining to you that that's what I am going to consider.

Mr. Donovan: In other words, you are going to overrule my Motion for Elimination of Extraneous Matters?

The Court: I am going to take up the Supplemental Motion now. We will see what needs to be done with reference to that. We're not going to take up his Original Motion to Dismiss.

[fol. 522] Mr. Bickley: If it please the Court, our Supplemental Motion to Dismiss is based upon a decision of the Supreme Court of Texas in Cause Number A-9340.

SUPPLEMENTAL MOTION TO DISMISS READ INTO RECORD

The Court: It might be well for you to read your Supplemental Motion, if you will.

Mr. Bickley: All right.

"Come Now the Defendants in the above entitled and numbered cause and with leave of the Court first had and obtained, file this their Supplemental Motion to Dismiss, supplementing their Original Motion to Dismiss and Original Answer previously filed herein, and still insisting upon the same, move this Court to dismiss Plaintiffs' complaint for the additional following reasons, to-wit:

I.

The Supreme Court of Texas, in cause number A-9340, being an Original Mandamus suit filed by these Defendants against the Honorable Dick Dixon as Chief Justice and the other Justices of the Court of Civil Appeals for the Fifth Judicial District sitting at Dallas and all of the Plaintiffs herein and their attorney of record, styled *City of Dallas, et al, Relators, vs. Honorable Dick Dixon, Chief Justice, et al, Respondents*, did issue an Original Mandamus directed to the said Court of Civil Appeals. The opinion expressly found that the issues sought to be litigated in this cause, are the same issues that were litigated, or should have been litigated in the cause of *Atkinson et al versus City of Dallas*, 353 S.W. 2d 275, that the prayer for ultimate relief is the same, that the parties are the same, and therefore, this suit is foreclosed by the Judgment in that case. The Court then requested the Court of Civil Appeals to grant writs necessary for the enforcement of its Judgment in *Atkinson et al versus City of Dallas*. This opinion was delivered March 13, 1963, and is attached hereto as Exhibit 'A' and made a part hereof for all purposes. The Supreme Court subsequently issued a letter dated April 10, 1963, and a Supplemental Opinion taxing costs, which is attached hereto as Exhibit 'B' and made a part hereof for all purposes.

II.

Subsequent to the Opinion of the Supreme Court, the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas in cause number 16,193 styled *City of Dallas et al, Petitioners, vs. Daniel C. Brown, et al, Respondents*, on the 16th of April, 1963, issued its Writ of Prohibition and Ancillary Orders which is attached hereto as Exhibit 'C' and made a part hereof for all purposes.

III.

These instruments on their face show that the Plaintiffs have no justiciable interest and that the matter sought to be litigated herein has been foreclosed by previous litigation;

[fol. 524] hence, no justiciable controversy is alleged or can be alleged.

Wherefore These Defendants Pray that said cause be wholly dismissed at Plaintiffs' cost with prejudice to re-filing the same or any part thereof, and that this cause be concluded without delay."

Mr. Bickley: If you would like for me to explain it, Your Honor?

The Court: Yes, go right ahead.

Mr. Bickley: It is simply our contention under this Motion that matters alleged herein are the same matters that have been alleged in *Atkinson versus City of Dallas*; that we then brought an action in the Court of Civil Appeals to have this matter construed; it went to the Supreme Court of Texas. The Supreme Court of Texas issued a Writ of Mandamus requiring the Court of Civil Appeals to issue a Writ of Prohibition or other Orders that might be necessary to enforce the Judgment in *Atkinson versus City of Dallas*.

The Supreme Court in its Opinion said the parties are the same, the issues are the same, and that the litigation has reached the point of being harassing and vexatious, and therefore something should be done.

The Court of Civil Appeals followed that Order and they issued their Order against the parties individually, against [fol. 525] the attorney, and against all in the class from interfering with the issuance of the bonds for the building of the new runway at Love Field.

The Court: Mr. Donovan.

Mr. Donovan: Now, if the Court please, I renew my Motion for a ruling on my Motion to Exclude this as matter extraneous to the pleading under Rule 12.

The Court: I overrule your Motion.

Mr. Donovan: May I enter an Order to that, Your Honor?

The Court: Certainly.

Mr. Donovan: And do I understand that you are also denying my Motion for Postponement, to give us an opportunity to submit pertinent documents under Rule 56?

The Court: I am overruling your Motion.

STATEMENT RE ACTION OF THE COURTS

By Mr. Donovan:

Well, your Honor, under those circumstances I find myself compelled to answer the argument of Mr. Bickley.

I might call to the attention of the Court that this argument which Mr. Bickley has made has been repeated consistently since April 3, 1961—that the City is being harassed. Our position has been that if anybody has been harassed, we have been.

We are dead serious in our litigation and our contention has been consistent since we filed this federal suit, that there is nothing in the federal suit that has been adjudicated in the State suit. In the State suit, we had no problems of outstanding bonds. Our State suit was fundamentally an action calculated to prevent the seizure of property rights in violation of the Constitution of the United States and the Constitution of the State of Texas without compensation.

As part of that suit, there was incorporated a prayer for an injunction against the proposed issuance of bonds, revenue bonds, to finance such seizure without an election, as we contend was required by statute.

Now, we lost our *Atkinson* suit and there was an opinion written by the Court of Civil Appeals in that case. We applied for a Writ of Error to the Supreme Court of the State of Texas. At that time the Supreme Court of the State of Texas denied the Writ with the notation "Writ Refused—No Reversible Error". In other words, they did not adopt the Court of Civil Appeals opinion for whatever it was worth.

In any event, we carried that case through; we applied for a Writ of Certiorari to the United States Supreme Court, which was denied, and we applied for a Re-hearing, which was denied.

The City continued its efforts. We had not had a day in court; we had not had a ruling on the validity of outstanding bonds; we had no bondholders in the original suit. [fol. 527] Of course, money is the source of all evil in most instances, and in this case, we consider it the source

of our evil, so we made an examination of the validity of bonds outstanding, and after all this had been concluded by the Judgment of July 21, certain facts came to our knowledge—certain changes were made in the rules and regulations, and in addition to that, certain actions were taken by the City which brought to our attention certain facts that didn't seem to be right.

Now, on September 24, 1962, some 122 Plaintiffs filed an action before this Court charging violation of their civil rights under the Federal statutes, violation of the Civil Rights law, by the Defendants named. The meat of that violation was the denial of an election, which exists in the statute, which has not been amended, has not been repealed, and under the law of Texas cannot be repealed by implication.

Now, the case which was relied upon in the Court of Civil Appeals that threw us out there, held that a taxpayer cannot enjoin the future or proposed issue of bonds. His remedy is that he might come in after the bonds are issued and seek to enjoin the payment of them, which is the procedure we have followed in relief given us by the Court of Civil Appeals. We filed this action on September 24, 1962. Apparently, the City of Dallas was unwilling to contest the question which had been raised, and to avoid having to [fol. 528] come into court and answer properly, they first filed a Motion and an Answer which moved to Advance the Cause. That was filed only by the city attorneys without any appearance on the part of the Defendants. We had a conference on that and the Motion was not pressed.

Then, to avoid coming into this Court and submitting to this Court its jurisdiction as to the questions involved in this District suit, they went to the Court of Civil Appeals of Dallas, and they asked that Court to enjoin any further prosecution of this action in Federal court. This Court may recall at that time we tried to protect our rights by appealing to this Court for a temporary injunction—for an injunction against the interference by the State Court.

This Court in its wisdom said that she had great confidence in the Court of Civil Appeals of Dallas, in their integrity, in their ability, and in their willingness to apply the Rule of Comity, and denied our request for injunction. We went ahead and brought the proceedings before the State Court and by a decision of two to one, the Court of Civil Appeals refused to issue the Writ of Prohibition which was requested by the Defendants in this action to keep us from trying our Federal rights in a Federal Court under Federal law, and the Court of Civil Appeals wrote an opinion on it, which in my opinion was very clear.

In the particular findings of fact—they said that “the [fol. 529] mere filing of the suit here, was not such an interference” in their Judgment “as to justify the issuance of a Writ of Prohibition”.

Under State law there is no appeal from that decision. The Supreme Court has no authority to review it. By appeal, there is no application provided for Writ of Error. In other words, it is one case in which the Court of Civil Appeals jurisdiction is final by statute. So, to evade that finality, and because the City still didn't want to try this lawsuit, they went to the Supreme Court of Texas on an Application for a Writ of Mandamus, under an original mandamus proceeding, which is just a device to vest in the Supreme Court of Texas authority not given to it by statute. The Supreme Court of Texas wrote an opinion which I stated in my Motion for Re-Hearing was contentious and insulting to the Court of Civil Appeals. They took it upon themselves to advise the Court of Civil Appeals that they could not dismiss this case in Federal Court, but they told the Court of Civil Appeals to do indirectly what they couldn't do directly. They said to issue orders putting an end to this litigation.

Now, Counsel says that they found the parties to be the same. If the Court will just pick up the pleadings in the Atkinson case and pick up the pleadings in the Brown case, you will find the parties are not the same. There [fol. 530] were 42 parties in the action in the Atkinson case. Those 42 parties included some of the ones in the present Brown action, however, there were 13 of those parties who dropped out in the Brown action and are not

now and have never been parties, and of that group, one man has died.

Now, to show you how much consideration was given by the Supreme Court of Texas to this Application for Mandamus, and how deliberate they were in making their Order, the Order was against 13 parties that were not even parties to the proceedings, including the man who has died.

We don't consider that an Order that's even worth respect.

After that was done, they went on to hold that the prayer for relief in the Brown case and the Atkinson case are the same. That's disputed by the record and contradicted by the record.

They went on to say all the issues in the Brown case and all the issues in the Atkinson case are the same. If that proves anything, it proves they haven't read the record.

Now, then, the Court of Civil Appeals had no choice but to make an Order.

I think the Court should note that the Supreme Court didn't order the Court of Civil Appeals to do it, but it threatened it with an Order of Mandamus if the Court of [fol. 531] Civil Appeals failed to comply with its Opinion.

After that Mandate was sent down to the Court of Civil Appeals, none of the parties to the proceeding for Writ of Prohibition in the lower Court were ever given notice of an application for a new Order or for setting aside or reversing the Judgment rendered by the Court of Civil Appeals.

None was ever given to any of the parties here as application for the all-inclusive Writ which has been issued.

If the Court will examine this Writ, you will find an injunction which has been served on us, and you will find it enjoins everybody in the Love Field area of Dallas, every attorney who might represent them—from ever attempting to prevent the construction of a new runway at Love Field, from ever raising any question of any revenue bonds issued—airport revenue bonds issued under 1269 (j) of the Statutes of Texas.

They said that the reason they were able to do that was that the Atkinson case was a class action and involved a question of public interest.

If the Court will examine the Atkinson case, the Court will find out that it didn't involve a question of public interest except as indirectly. It was a group of citizens fighting for their homes and trying to insist on their rights [fol. 532] to keep those homes, unless they were taken from them under the rights of Eminent Domain and they were compensated for them. That is not such a ruling involving private rights that it becomes a public interest, but they say because of that case that this case is barred—everybody in the City is barred from suing the City more than once.

They went on to hold that though there were no bond-holders represented as Defendants in the first action, that "our cause as stated here on the outstanding revenue bonds should have been included and tried there". It was an improper item. It could not have been without joinder of new parties.

In other words, the Supreme Court of Texas has taken upon itself to re-write the pleadings in the Atkinson case and to misconstrue the pleadings in the Brown case.

We feel that if this law is correct, it is probably open to loopholes and much of the trouble has been going on for some time. In other words, we have in the State of Texas for years had decisions which hold for the provisions of equal facilities for negroes and whites in compliance with the Constitution.

If this Ruling attempted to be inflicted upon us in this case is correct, then there is nothing to prevent any school board from going into the Supreme Court of Texas under a Writ of Mandamus and asking the Supreme Court of Texas to Order the lower court to enjoin the person seeking integration from prosecuting a suit in Federal court.

Our contention is simply that the Supreme Court of Texas has usurped power which is not given to it by the Legislature in an effort to aid the municipal authorities.

Our contention is that they are interfering with the jurisdiction of this Court, and under the laws and rules of the

United States of America, this Court has the right to enjoin such interference and to refute it.

We have filed already in this court an Application for Injunction against both the Court of Civil Appeals and the Supreme Court of Texas. We have still available the application for Writ of Certiorari to the United States Supreme Court. We expect and intend to use all available sources, legal sources, for the protection of our rights.

We hold that this is an unconstitutional illegal interference with the authority and jurisdiction of this Court, and that the Supreme Court of Texas has denied to the Court of Civil Appeals the right to exercise discretion, and has found facts contrary to that found by the Court of Civil Appeals; that the Supreme Court of Texas has taken upon itself to decide the matters which we have brought to this Court for a decision; and we contend that that action is invalid.

We further contend that the insertion of all these Opinions and Injunctions and what-not in this Motion to Dis- [fol. 534] miss are extraneous to the pleading under attack and are not subject to consideration unless given our opportunity to defend as is provided under Rule 56 of Federal Procedures.

We ask that the Motion be dismissed.

REPLY RE COURTS' ACTIONS

By Mr. Bickley:

If it please the Court—in a very brief answer to the matters brought out by opposing Counsel, we cannot find the same contempt for the decisions of the courts of this State that he finds, and we think that they speak for themselves.

The Court has so found, and we think that having so found, that someone should be bound by it.

He refers to the School Board going and getting an injunction of some sort in this sort of thing. This is a unique case—this is a unique case—in that it is the only action in which the mere filing of a suit amounts to an injunction and a stoppage of the sale of the bonds. In no other case does this happen—in just the filing of the suit—whether warranted or not.

We maintain that having had his day in court, and certainly he has had it—he and all of his parties, that at some time, some place—there should be an end to this type of litigation, and parties should be made responsible for their acts, and we ask this Court to dismiss this suit in order that the City of Dallas might reap the benefits of an action hard fought between Counsel and ourselves over a [fol. 535] long period of time.

ORAL OPINION, HUGHES, J., MAY 2, 1963

The Court: As you both know, I have read the pleadings in this case. I have likewise read the Opinions of both the Supreme Court and the Court of Civil Appeals, and incidentally, I think very highly of the Chief Justice of the State of Texas, who wrote the Opinion in the Supreme Court case, and I know that he does a great deal of research and his Opinions are written very carefully.

The parties are the same, since the Atkinson case was brought as a class action and so includes all of the parties in that neighborhood.

The issues that are sought to be litigated in the case in the Federal Court have been held by the Supreme Court to be the same as the issues which have been litigated in the Atkinson case.

The prayer for relief is similar.

In my opinion there is no justiciable issue to be presented in the Federal court case. All the issues have been decided in the Atkinson case.

I consider that you are attempting to make me an Appellate Court for the Supreme Court, and that your appeal is to the Supreme Court of the United States, and not to this Court.

You and the litigants in this case have been prohibited from proceeding in this case and therefore I dismiss the [fol. 536] case as asked for by the City Attorney's Office.

Mr. Bickley: Thank you, Your Honor.

Mr. Donovan: Note my exception, Your Honor.

The Court: All right. I will ask Mr. Bickley to prepare the Order.

Mr. Bickley: All right. Thank you, Your Honor.

(Proceedings thereupon concluded.)

[fol. 537] Court Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 538] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
No. 9276 Civil

DANIEL C. BROWN, et al., Plaintiffs,

vs.

CITY OF DALLAS, et al., Defendants.

ORDER DISMISSING SUIT—May 9, 1963

This, the second day of May, 1963, came on to be considered the Motion of the City of Dallas, et al., Defendants in the above entitled and numbered cause, to dismiss this cause and all parties having appeared by attorneys and the Court, having considered the pleadings, the evidence submitted to the Court and argument of counsel, is of the opinion that said cause is without merit and should be dismissed.

It Is Therefore Ordered, Adjudged and Decreed That the Plaintiffs take nothing and that this cause be dismissed in all things and that costs be adjudged against the Plaintiffs, for which let execution issue.

Entered on this 9th day of May, A.D., 1963.

Sarah T. Hughes, Judge presiding.

Approved as to form.

James P. Donovan, Attorney for Plaintiffs.

[fol. 539] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
No. 9276 Civil

DANIEL C. BROWN, et al., Plaintiffs,

vs.

CITY OF DALLAS, et al., Defendants.

ORDER PERMITTING WITHDRAWAL OF CERTAIN PARTIES PLAINTIFF AND PERMITTING ADDITION OF NEW PARTIES PLAINTIFF
—May 9, 1963

On this 2nd day of May, 1963, came on to be heard at a regular term of this Court, Plaintiffs Motion in the above entitled and numbered cause for permission to certain Plaintiffs to withdraw from this action and to add certain parties as new Plaintiffs herein and the Parties hereto having appeared by their respective counsel, and no objection being raised to the granting of said Motion, now therefore it is

Ordered, Adjudged and Decreed that said Plaintiffs Motion be and it hereby is in all respects granted and the following named Plaintiffs are hereby permitted to withdraw as Plaintiffs herein: Faye Richardson, Charles Williamson, Jerry Williamson, E. W. Quinton, Geneva Quinton, Dorothy Boland, Arthur G. Rudkin, Helen Rudkin, Arthur E. Tappan, Bettie Tappan, E. Gardner Clapp, Stella Clapp, Jack H. Broom, Jane Broom, George B. Lotridge, Browning Lotridge, Lometta McDonald, J. D. Lowrie, Jr., Lillian Lowrie, Anna Marie Pyland, Calvin Pylant, Lewis A. Park, Lola E. Park, S. A. Myrick, Dorothy Lusk Myrick, Robert L. Brackett, Juanity Isom, E. T. Cramer, S. R. Kirby, Jean [fol. 540] Shaw, C. D. Crudginton, Harriet Crudginton, J. O. Garrett, Amy Ross Garrett, Paul Short, Besa Fairtrace Short, Arthur B. MacKinstry, III, June C. MacKinstry, James H. Murray, E. T. Busch, Louise Busch, Dr.

Grant Boland, J. F. McClain, Charlene McClain, Mary R. Gore, Lawrence R. Schmidt, J. M. Berry, Ethel Berry, C. J. Bitter, Patricia Bitter, Forrest McKee, Dorothy McKee, James O. Boyd, Robie Boyd, Arvil Jarman, Mary Jarman, William S. Holden, Virginia Holden, J. W. McCulley, J. H. Huddleston and Richard Zacha; and Counsel for Plaintiffs having today advised this Court that the names of Plaintiffs Harvey Waldman and Evelyn Waldeman had inadvertently been omitted from the list of Plaintiffs desiring to withdraw from this action, now on motion of Counsel for Plaintiffs, it is further

Ordered that the Application of said Plaintiffs Haryey Waldman and Evelyn Waldeman to withdraw from this cause be and it is hereby granted; and Counsel for the Plaintiffs having moved for the addition of new parties Plaintiff, it is hereby

Ordered that the following named persons be permitted to intervene herein as Parties Plaintiff: William G. Byars, Mrs. L. A. Danek, G. C. Karr, Andrey M. Karr, Russell G. Rogers, Caroline Rogers, Mrs. Arlene E. Davis, and Donald S. Reckrey.

Signed and entered this 9th day of May, 1963.

Sarah T. Hughes, United States District Judge,
Northern District of Texas.

Approved as to Form—N. Alex Bickley.

[fol. 541] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
No. 9276 Civil

DANIEL C. BROWN ET AL., Plaintiffs,

vs.

CITY OF DALLAS ET AL., Defendants.

ORDER DENYING PLAINTIFFS' MOTIONS—May 9, 1963

On this 2nd day of May, 1963, came on to be heard Defendants' Motion and Supplemental Motion for Dismissal of the above entitled and numbered cause, and Plaintiffs having duly filed a Motion with this Court praying that this Court exclude extraneous material to the pleadings from consideration in determination of said Motions, and in the alternative, that if such extraneous matter be not excluded that this Court make an Order stating the Court's election to consider Defendants' Motions for Dismissal as Motions for Summary Judgment and granting Plaintiffs a reasonable opportunity to present all material pertinent to such a Motion under Rule 56 of the Federal Rules of Civil Procedure, and the Court having heard argument of Counsel, and being of the opinion that both motions should be denied, now therefore it is

Ordered that the aforesaid Motions made by the Plaintiffs herein be and they are hereby in all respects denied.

Signed and entered: May 9, 1963

Sarah T. Hughes, United States District Judge,
Northern District of Texas.

Approved as to form:
N. Alex Bickley

[fol. 542]. [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHEEN DISTRICT OF TEXAS
No. 9276 Civil

DANIEL C. BROWN ET AL., Plaintiffs,

VS.

CITY OF DALLAS ET AL., Defendants.

NOTICE OF APPEAL TO COURT OF APPEALS, FIFTH CIRCUIT
—Filed May 15, 1963

Notice is hereby given that Daniel C. Brown, Mary Brown, Paul A. Crick, Anne K. Crick, William G. Byars, Austin Crow, Alberta R. Crow, J. W. Tomlin, Charline Tomlin, Janet McCluer, H. P. McDonald, Martin E. Collis, Jr., Norma June Collis, Marion Logan, P. D. King, Nancy King, R. C. Logan, James W. Odom, James E. Strum, Linnis Strum, Pauline Pitt, R. L. Pitt, W. H. Richardson, U. J. Boland, Dorothy Boland, Joan Parr, B. D. Siegel, Marion Lee Siegel, Walter Sodeman, George Atkinson, William C. Isom, Dr. Hobson Crook, Russell Moore Crook, J. W. Slaughter, Jr., G. C. Karr, Audrey M. Karr, Donald S. Reckrey, Mrs. Arlene E. Davis, L. A. Danek, Mrs. L. A. Danek, James H. Parr, Frank Grimes, Lena Mae Grimes, Christine C. Slaughter, M. E. Worrell, Jr., Paul M. Crawford, Norma Crawford, M. J. Pellillo, Zelma Pellillo, Wayne Hood, Geneva Hood, Emily F. Slaughter, Lee R. Slaughter, Russell G. Rogers, Caroline M. Rogers, Plaintiffs in the above entitled and numbered cause, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Order entered herein on May 9, 1963 which [fol. 543] Order denied Plaintiffs' Motions for exclusion of extraneous material from consideration upon decision of Defendants' Motion and Supplemental Motion to Dismiss, and Plaintiffs' Motion for a continuance to present material

pertinent to the Motion considered under Rule 56 of the Federal Rules of Civil Procedure, and the final Judgment Dismissing Plaintiffs' cause entered under date of May 9, 1963.

James P. Donovan, Attorney for Appellants, 30½
Highland Park Shopping Village, Dallas 5, Texas.

[fol. 544] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
No. 9276—Civil

DANIEL C. BROWN et al., Plaintiffs,

vs.

CITY OF DALLAS et al., Defendants.

APPELLANTS' BOND ON APPEAL—Filed May 15, 1963

Whereas, in the above entitled and numbered cause, pending in the United States District Court, Northern District of Texas, Dallas Division, at a regular term of said Court, to wit, May 9, 1963, Defendants recovered a Judgment against Plaintiffs adjudging that the Plaintiffs take nothing by their suit and that their cause be dismissed, from which Judgment the following Plaintiffs wish to take an Appeal to the United States Court of Appeals, Fifth Circuit, namely: Daniel C. Brown, Mary Brown, Paul A. Crick, Anne K. Crick, William G. Byars, Austin Crow, Alberta R. Crow, J. W. Tomlin, Charline Tomlin, Janet McCluer, H. P. McDonald, Martin E. Collis, Jr., Norma June Collis, Marion Logan, P. D. King, Nancy King, R. C. Logan, James W. Odom, James E. Strum, Linnis Strum, Pauline Pitt, R. L. Pitt, W. H. Richardson, U. J. Boland, Dorothy Boland, Joan Parr, B. D. Siegel, Marion Lee Siegel, Walter Sodeman, George

Atkinson, Dr. Hobson Crook, Russell Moore Crook, William C. Isom, J. W. Slaughter, Jr., G. C. Karr, Audrey M. Karr, Donald S. Reckrey, Mrs. Arlene E. Davis, L. A. Danek, Mrs. L. A. Danek, James H. Parr, Frank Grimes, Lena Mae Grimes, Christine C. Slaughter, M. E. Worrall, Jr., Paul M. Crawford, Norma Crawford, M. J. Pellillo, Zelma Pellillo, Wayne Hood, Geneva Hood, Emily F. Slaughter, Lee R. Slaughter, Russell G. Rogers, and Caroline M. Rogers; now therefore

Know All Men by These Presents, that we the named Plaintiffs-Appellants, acting through their Attorney, James P. Donovan, as Principals, and Lawyers Surety Corporation, as Surety acknowledge ourselves to be bound to pay to the Defendants herein, the sum of two hundred fifty dollars (\$250.00) conditioned that the said Plaintiffs-Appellants shall prosecute their Appeal with effect and shall pay all costs if the Appeal be dismissed or the Judgment affirmed, or such costs as the appellate court may award if the Judgment be modified. Witness our hands, May 16, 1963.

Plaintiffs-Appellants Daniel C. Brown et al., By
James P. Donovan, Attorney;

Lawyers Surety Corporation, By E. M. Austin,
Attorney in Fact, Lawyers Surety Corporation,
10th Floor, Fidelity Union Tower, Dallas 1,
Texas, Bond #109193.

[fol. 544a] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
No. 9276

DANIEL C. BROWN et al.,

vs.

CITY OF DALLAS et al.

PETITION TO DISMISS APPEAL—Filed June 11, 1963

Whereas, Appellants named in the Notice of Appeal to the United States Court of Appeals, 5th Circuit, filed herein May 16, 1963, have heretofore been fined for contempt by the Court of Civil Appeals, 5th Supreme Judicial District of Texas for violation of an alleged Writ of Prohibition issued by said Court prohibiting them from further prosecution of this action; and

Whereas, some of said Appellants have been fined and their Attorney jailed for 20 days for filing an injunction suit in Federal Court against the Supreme Court of Texas and the said Court of Civil Appeals to test the validity of their orders restraining Appellants from prosecution of this suit; and

Whereas, the United States District Court for the Northern District of Texas has wholly failed to protect its jurisdiction or these Appellants, and has dismissed this and the aforementioned injunction suit brought to test the validity of the State Court orders; and

Whereas, the Attorney for Defendant City of Dallas and the Chief Judge of the Court of Civil Appeals have threatened these Appellants and their Attorney with further prosecution for contempt resulting in additional fines and imprisonment:

Now, therefore, under the duress above stated, Appellants named in the Notice of Appeal filed herein on May 16, 1963 respectfully request that said Appeal be dismissed.

James P. Donovan, Attorney for Appellants, 30½
Highland Park Shopping Village, Dallas 5, Texas.

Dated: June 5, 1963

[fol. 544b] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 545] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
No. 9276

DANIEL C. BROWN, ET AL.,

v.

CITY OF DALLAS, ET AL.

ORDER DISMISSING APPEAL—June 14, 1963

This The 14 day of June, 1963, came on to be considered by the Court the Petition of James P. Donovan, attorney for the Appellants in the above entitled and numbered cause, to dismiss said appeal, and it appearing to the Court that all but three of the Appellants have previously heretofore withdrawn from this cause on their own written request, the Court is of the opinion that the appeal should be dismissed.

It Is, Therefore, the Order, Judgment and Decree of this Court that the Petition of James P. Donovan on behalf of the Appellants to dismiss the appeal is hereby granted and said cause and the appeal of the same is hereby dismissed, and that all costs of suit shall be taxed

against the Appellants herein, for all of which let execution issue.

Entered this 14 day of June, 1963:

Sarah T. Hughes, Judge of the United States District Court, Northern District of Texas.

[fol. 546] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 547] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

No. CA-3-63-120 Civil

James P. Donovan, Daniel C. Brown, Mary Brown, R. L. Pitt, Pauline Pitt, Harvey Bell, Austin Crow, Alberta R. Crow, Frank Grimes, Lena Mae Grimes, W. H. Richardson, Faye Richardson, B. D. Siegel, Marion Lee Siegel, Paul L. Crick, Anne K. Krick, E. W. Quinton, Geneva Quinton, W. C. Jones, U. J. Boland, Dorothy Boland, Arthur G. Rudkin, Helen Rudkin, James E. Stram, Linnis Strum, Paul M. Crawford, Nora Crawford, Martin E. Collis, Jr., Norma June Collis, George Atkinson, Jack H. Broom, Jane Broom, George B. Lotridge, Browning Lotridge, J. W. Tomlin, Charlene Tomlin, H. P. McDonald, Lometta McDonald, J. D. Lowrie, Lillian Lowrie, Anna Marie Pylant, Calvin Pylant, Lewis A. Park, Lola E. Park, S. A. Myrick, Dorothy Lusk Myrick, William C. Isom, Juanita Isom, Walter Sodeman, J. H. Parr, Joan S. Parr, J. W. Slaughter, Jr., Christine C. Slaughter, James W. Odom, Helen Odom, M. J. Pellillo, Zelma Pellillo, C. D. Crudgington, Harriet G. Crudgington, Dr. Hobson Crook, Russell Moore Crook, J. O. Garrett, Amy Rose Garrett, Paul Short, Besa Fairtrace Short, R. C. Logan, Marion Logan, Dee Powell, Jessie Powell, Arthur B. MacKinstry, III, June C. MacKinstry, P. D. King, Nancy

King, M. E. Worrell, Jr., Lucille Worrell, Dr. Grant Boland, Fred M. Gore, Mary R. Gore, L. A. Danek, Wayne Hood, Geneva Hood, Janet McCluer, Arvil Jarman, Mary Jarman, Harvey Waldman, Evelyn Waldman, J. H. Huddleston, C. G. Karr, Audrey S. Karr, Plaintiffs,

vs.

[fol. 548] Supreme Court of Texas, Chief Justice Robert W. Calvert, Associate Justices, Meade F. Griffin, Clyde E. Smith, Frank P. Culver, Jr., Ruel C. Walker, James R. Norvell, Joe R. Greenhill, Robert W. Hamilton, Zollie C. Steakley, Court of Civil Appeals, Fifth Supreme Judicial District of Texas, Chief Justice Dick Dixon, Associate Justices Claude Williams and Harold A. Bateman, Defendants.

PLAINTIFFS' ORIGINAL COMPLAINT—Filed April 23, 1963

Plaintiffs complaining of the Defendants allege:

1.

That all of the Plaintiffs in this action are residents of the City and County of Dallas, State of Texas.

2.

That the Supreme Court of Texas is a Court of limited jurisdiction with offices located in the Supreme Court Building, Austin, Texas; that the named Chief Justice of said Court and the named Associate Justices thereof are resident in the City of Austin, Texas.

3.

That the Court of Civil Appeals, Fifth Supreme Judicial District of Texas, is a State Court of limited jurisdiction with offices in the Records Building at Dallas, Texas; that the named Chief Justice and named Associate Justices thereof are all residents of the City of Dallas, Texas.

4.

This Court has jurisdiction of this cause under Sections 1651 and 1343 of Title 28, U. S. C.

[fol. 549]

5.

That all of the Plaintiffs herein named other than James P. Donovan, C. G. Karr and Audrey S. Karr, are Plaintiffs in a cause now pending before this Court, the style of that cause being Brown et al., vs. City of Dallas, et al., the original complaint therein having been filed September 24, 1962 under Civil No. 9276; that James P. Donovan, Plaintiff, is the Attorney of Record for Plaintiffs in Cause No. 9276, and that C. G. Karr and Audrey S. Karr are members of a class designated in the Court of Civil Appeals Order hereinafter referred to.

6.

That after the filing of the Complaint in the United States District Court for the Northern District of Texas, Civil Cause No. 9276, all of the Defendants entered a general appearance therein on September 25, 1962 and filed a Motion to advance the cause for hearing on the merits, suggesting October 2, 1962 as a date for such hearing; that without waiting for a decision on the Motion filed, the Defendants in Cause No. 9276, did on October 2, 1962 file a Petition with the Court of Civil Appeals, Fifth Supreme Judicial District of Texas, praying for a Writ of Prohibition against the further prosecution of United States District Court Civil Action No. 9276 by Plaintiffs therein and their Attorney, and ancillary orders enjoining everyone in the area of Love Field, Dallas, Texas from ever questioning the City's right to construct a new parallel northwest-southeast runway at that field according to the City's plan; that thereafter Plaintiffs in cause No. 9276, [fol. 550] on October 6, 1962 filed an Application to Stay State Court Proceedings, the hereinabove referred to Petition for Writ of Prohibition. That the Hon. Sarah T. Hughes, District Judge, granted a hearing on said Plaintiffs' Application for Stay, denying the relief prayed for

on the grounds that having the utmost respect for the ability and integrity of the Court of Civil Appeals, Fifth Supreme Judicial District of Texas, she believed that that Court would not interfere with the action pending before her, and that under general rules of comity, it would be improper for the District Court to stay the proceeding.

7.

That the confidence of the District Court in the Court of Civil Appeals Fifth Supreme Judicial District of Texas was justified by the opinion rendered by a majority of that Court on October 24, 1962, (a copy of which is attached hereto, made part hereof, and marked "Exhibit A"), in which they refused the Application for Writ of Prohibition, entering Judgment on that date in accordance with said opinion. (Copies of said opinion being already in possession of each Defendant, this Exhibit will not be served.) A dissenting opinion was rendered by Justice Young, (copy attached as "Exhibit B") and the Petitioners Motion for Rehearing was denied, Justice Young dissenting, on November 23, 1962. (Copy attached, "Exhibit C".)

8.

That under Texas law, the Judgment of the Court of Civil Appeals, Fifth Supreme Judicial District, entered October 24, 1962, became final with the denial of the Petitioners' Motion for Rehearing on November 23, 1962; that under the laws of Texas no review of the Judgment entered is permitted through Writ of Error application to the Supreme Court of Texas.

9.

That on or about the 5th day of December 1962, the Defendants in Cause No. 9276 who had lost their Petition for Writ of Prohibition in the Court of Civil Appeals filed a Motion before the Supreme Court of Texas for leave to file a Petition for Original Mandamus, which Motion was granted by the Supreme Court; that said Petition was thereafter filed, a hearing had thereon, and an opinion

rendered in favor of Petitioners on March 13, 1963, Judgment being entered in accordance therewith on the same day; the Opinion of the Supreme Court is attached hereto, marked "Exhibit D" and a copy of the Order entered thereon is hereto attached and marked "Exhibit E"; that the said Supreme Court denied Plaintiffs' Motion for Re-hearing on April 10, 1963.

10.

That a certified Order of the Supreme Court of Texas (Exhibit E) was delivered to the Court of Civil Appeals Fifth Supreme Judicial District of Texas on the 11th day of April, 1963, after which the latter Court entered an injunction against these Plaintiffs' further prosecution of the action pending before this Court as Civil Cause No. 9276; that a copy of said Order is attached hereto and marked "Exhibit F".

11.

That the action of the Supreme Court in directing the Court of Civil Appeals to reverse its judgment was a [fol. 552] usurpation of judicial authority not delegated to it by the Constitution and Laws of the State of Texas, was an action taken under color of law to threaten and intimidate these Plaintiffs' and their Attorney's prosecution of their rights in Federal Court; that recognizing that it was without power to order the dismissal of Plaintiffs' Federal Suit it attempted to accomplish the same result indirectly by enjoining Plaintiffs from prosecuting it; that said action is an interference with this Court, and an invasion of its jurisdiction, and a denial of Plaintiffs' Civil rights guaranteed by the Constitution and laws of the United States.

12.

That the gravamen of the decision of the Court of Civil Appeals was that the Federal Court was competent to determine whether the issues raised were determined in the State suit brought by some thirty of the 120 Plaintiffs under the style of Atkinson v. City of Dallas; that the mere filing of the suit in Federal Court was not an interference

with the Judgment in that case; that the Writ applied for being available only in the absence of an adequate remedy at law, the Writ should not issue.

13.

That the Supreme Court admitted that the Judgment in the Atkinson case was not a Judgment of the Supreme Court of Texas; however, it held that the Court of Civil Appeals had exercised its discretion incorrectly and ordered that Court to change its opinion to agree with that of the Supreme Court, holding in effect that the only Court which could rule on the question of *Res Adjudicata* was the Appellate Court which entered the Judgment.

[fol. 553] That the injunction issued against these Plaintiffs by the Court of Civil Appeals, was entered by that Court under threat of Mandamus and punishment for contempt by the Supreme Court of Texas; that the Judgment rendered by the Court of Civil Appeals was not within its jurisdiction because there is no proceeding pending before that Court at this time; that the final Judgment entered October 24, 1962 is *res adjudicata* as to the matters purported to authorize issuance of the injunction.

15.

That on October 12, 1962 the Defendants in Federal Cause No. 9276 filed a Motion to Dismiss the Complaint therin and an Original Answer, both of which pleadings raised the question of *Res Adjudicata* in the same manner as it was raised before the Court of Civil Appeals and the Supreme Court of Texas.

16.

That the Hon. Sarah T. Hughes has set a hearing on said Motion for the 25th day of April, 1963, notice thereof being given by her letter of April 19, 1963; that these Plaintiffs have a right to seek review of the action of the Defendant Courts in this matter, by Writ of Certiorari to the United States Supreme Court; that unless the Plain-

tiffs are granted an injunction against the Defendant Courts and the Justices thereof, Cause No. 9276 will be dismissed by reason of Plaintiffs' inability to prosecute the same because of the outstanding injunction; that if said case be dismissed, then the Plaintiffs right to review by Certiorari will become moot and will be lost.

[fol. 554]

17.

That unless Plaintiffs be permitted to prosecute action 9276 in the United States District Court in enforcement of their rights under the Constitution and laws of the United States, they will sustain irreparable damage, in that the Defendants in said action have publicly announced their intention to proceed in a manner which Plaintiffs claim is illegal under the Federal Civil Rights Statutes, the Securities and Postal Fraud Statutes of the United States and the Constitution of the United States.

18.

That the actions of the Defendant Courts and the Justices thereof as hereinbefore alleged constitute an interference with the jurisdiction of the United States District Court for the Northern District of Texas, and a deprivation of Plaintiffs' rights to prosecute a suit in Federal Court to enforce their Federal rights, through force and intimidation exercised under color of law.

19.

Wherefore, Plaintiffs pray that this Court enter a restraining order against the Defendant Courts and the Justices thereof; restraining them and each of them from taking any further action interfering or tending to interfere with Plaintiffs' prosecution of United States District Court for the Northern District of Texas Civil Action No. 9276, pending hearing upon Plaintiffs' application for a Temporary Injunction against said Defendants; and Plaintiffs further pray that a Temporary Injunction be granted against Defendants herein, restraining them and each of them from

[fol. 555] interfering directly or indirectly with Plaintiffs' prosecution of Civil Cause No. 9276, now pending in this Court, pending final determination of this cause; and Plaintiffs further pray that upon final hearing of this cause, that all Defendants named herein be permanently enjoined from interfering directly or indirectly with the Plaintiffs' prosecution of their Cause No. 9276 now pending in this Court, and that they have such other and further relief as they may be entitled to in the premises.

James P. Donovan, Attorney for Plaintiffs, 30½
Highland Park Shopping Village, Dallas 5, Texas.

Duly sworn to by James P. Donovan, jurat omitted in printing.

[fol. 556]

EXHIBIT A TO PLAINTIFFS' ORIGINAL COMPLAINT

"Opinion, Dixon, Ch. J.," in Case No. 16193 in the Court of Civil Appeals omitted from the record here as it appears at printed page 10, side folio 48 supra.

[fol. 563]

EXHIBIT B TO PLAINTIFFS' ORIGINAL COMPLAINT

"Dissenting opinion, Young, J.," in Case No. 16193 in the Court of Civil Appeals omitted from the record here as it appears at printed page 16, side folio 55 supra.

[fol. 566]

EXHIBIT C TO PLAINTIFFS' ORIGINAL COMPLAINT

"Order overruling motion for rehearing" in Case No. 16193 in the Court of Civil Appeals omitted from the record here as it appears at printed page 19, side folio 58 supra.

[fol. 567]

EXHIBIT D TO PLAINTIFFS' ORIGINAL COMPLAINT

"Opinion, Calvert, Ch. J.," in Case No. A-9340 in the Supreme Court of Texas omitted from the record here as it appears at printed page 276, side folio 491 supra.

[fol. 581]

EXHIBIT E TO PLAINTIFFS' ORIGINAL COMPLAINT

"Judgment" in Case No. A-9340 in the Supreme Court of Texas omitted from the record here as it appears at printed page 58, side folio 113 supra.

[fol. 582]

EXHIBIT F TO PLAINTIFFS' ORIGINAL COMPLAINT

"Writ of prohibition and ancillary orders" in Case No. 16193 in the Court of Civil Appeals omitted from the record here as it appears at printed page 78, side folio 134 supra.

[fol. 586]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

Civil Action File No. CA-3-63-120

JAMES P. DONOVAN, et al, Plaintiffs,

vs.

Supreme Court of Texas, et al, Defendants.

**MOTION TO DISMISS AND DEFENDANTS' ORIGINAL ANSWER
OF THE SUPREME COURT OF TEXAS AND ITS JUSTICES—
Filed May 8, 1963.**

To the Honorable Judge of Said Court:

MOTION TO DISMISS

Come now defendants, the Supreme Court of Texas, Robert W. Calvert, the Chief Justice of said Court, and

the eight Associate Justices thereof, and file this their Motion to Dismiss this cause for the following reasons:

1.

[fol. 587] This cause should be dismissed for the reason that this Court is without jurisdiction to entertain it in view of Section 2283 of Title 28, U. S. C.

2.

Plaintiffs' Original Complaint, and the exhibits attached thereto, show no cause of action to be alleged against defendant Court or the respective Justices thereof, and this cause should be dismissed for the reason that plaintiffs are attempting to have this United States District Court act as an appellate court in reviewing the proceedings and judgments of the Supreme Court of Texas and of the Court of Civil Appeals, Fifth Supreme Judicial District of Texas, which action is not authorized by law and would violate the doctrine of comity between the Federal and State Courts.

Wherefore, premises considered, defendants pray that this motion be granted and the cause be dismissed.

Waggoner Carr, Attorney General of Texas;

Howard Mays, Assistant Attorney General, By
Howard Mays..

[fol. 588]

DEFENDANTS' ORIGINAL ANSWER

Subject to the foregoing Motion to Dismiss, come now defendants, the Supreme Court of Texas, Robert W. Calvert, the Chief Justice of said Court, and the eight Associate Justices thereof, and by way of answer would show to the Court as follows:

1.

Defendants admit the allegations contained in paragraphs 1, 2, 3, 9 and 10 of Plaintiffs' Original Complaint.

2.

Defendants deny the allegations contained in paragraphs 4, 8, 11, 12, 13, 14, 15, 17 and 18 of Plaintiffs' Original Complaint.

3.

Defendants deny the allegation contained in paragraph 5 of Plaintiffs' Original Complaint to the effect that all of the plaintiffs herein, other than the three named, are the same as in the case of Brown, et al vs. City of Dallas, et al, Cause No. 9276 in this United States District Court. The remainder of said paragraph is admitted.

4.

Defendants would show the Court that the matters alleged in paragraphs 6 and 16 of Plaintiffs' Original Complaint pertaining to proceedings in Cause No. 9276 in the United States District Court are not within the knowledge of these defendants.

As to paragraph 7 of Plaintiffs' Original Complaint defendants specifically deny the conclusions stated, but the [fol. 589] allegations of fact as to opinions rendered and the dates thereof are correct and are admitted.

6.

Defendants would further show that heretofore the Supreme Court of Texas handed down an opinion in the case of City of Dallas, et al, Relators vs. Honorable Dick Dixon, Chief Justice, et al. That opinion, which speaks for itself, is attached to the Plaintiffs' Original Complaint and marked "Exhibit D".

Wherefore, premises considered, defendants having answered pray that judgment be entered for defendants together with all costs incurred in these proceedings.

Waggoner Carr, Attorney General of Texas;

Howard Mays, Assistant Attorney General, By:
Howard Mays, Attorneys for Defendants, Supreme
Court Building, Austin 11, Texas.

Service (omitted in printing).

[fol. 590] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
Civil Action File No. CA-3-63-120

JAMES P. DONOVAN, et al, Plaintiffs,

vs.

Supreme Court of Texas, et al, Defendants.

MOTION TO DISMISS AND DEFENDANTS' ORIGINAL ANSWER
OF THE COURT OF CIVIL APPEALS, FIFTH SUPREME JUDI-
CIAL DISTRICT OF TEXAS AND ITS JUSTICES—Filed May 8,
1963.

To the Honorable Judge of Said Court:

MOTION TO DISMISS

Come now defendants, the Court of Civil Appeals, Fifth Supreme Judicial District of Texas, Dick Dixon, the Chief Justice of said Court, and Claude Williams and Harold A. Bateman, Associate Justices thereof, and file this their motion to dismiss this cause for the following reasons:

[fol. 591]

1.

This cause should be dismissed for the reason that this Court is without jurisdiction to entertain it in view of Section 2283 of Title 28, U. S. C.

2.

Plaintiffs' Original Complaint, and the exhibits attached thereto, show no cause of action to be alleged against defendant Court or the respective Justices thereof, and this cause should be dismissed for the reason that plaintiffs are attempting to have this United States District Court act as an appellate court in reviewing the proceedings and

judgments of the Supreme Court of Texas and of the Court of Civil Appeals, Fifth Supreme Judicial District of Texas, which action is not authorized by law and would violate the doctrine of comity between the Federal and State Courts.

Wherefore, premises considered, defendants pray that this motion be granted, and the cause be dismissed.

Waggoner Carr, Attorney General of Texas;

Howard Mays, Assistant Attorney General, By:
Howard Mays.

[fol. 592] DEFENDANTS' ORIGINAL ANSWER

Subject to the foregoing Motion to Dismiss, come now defendants, the Court of Civil Appeals, Fifth Supreme Judicial District of Texas, Dick Dixon, the Chief Justice of said Court, and Claude Williams and Harold A. Bateman, Associate Justices thereof, and by way of answer would show to the Court as follows:

1.

Defendants admit the allegations contained in paragraphs 1, 2, 3, 9 and 10 of Plaintiffs' Original Complaint.

2.

Defendants deny the allegations contained in paragraphs 4, 8, 11, 12, 13, 14, 15, 17 and 18 of Plaintiffs' Original Complaint.

3.

Defendants deny the allegation contained in paragraph 5 of Plaintiffs' Original Complaint to the effect that all of the plaintiffs herein, other than the three named, are the same as in the case of Brown, et al vs. City of Dallas, et al; Cause No. 9276 in this United States District Court. The remainder of said paragraph is admitted.

4.

Defendants would show the Court that the matters alleged in paragraphs 6 and 16 of Plaintiffs' Original Complaint pertaining to proceedings in Cause No. 9276 in the United States District Court are not within the knowledge of these defendants.

5.

As to paragraph 7 of Plaintiffs' Original Complaint defendants specifically deny the conclusions stated, but the [fol. 593] allegations of fact as to opinions rendered and the dates thereof are correct and are admitted.

6.

Defendants would further show that heretofore the Supreme Court of Texas handed down an opinion in the case of City of Dallas, et al, Relators vs. Honorable Dick Dixon, Chief Justice, et al. That opinion, which speaks for itself, is attached to the Plaintiffs' Original Complaint and marked "Exhibit D".

In accordance with said opinion the Supreme Court of Texas entered a judgment which, together with the opinion, it certified for observance to the Court of Civil Appeals, Fifth Supreme Judicial District of Texas.

Thereafter, on the 16th day of April, 1963, this Court of Civil Appeals in obedience to the said judgment and decree of the Supreme Court of Texas, did issue its Writ of Prohibition and Ancillary Orders, a true copy of which is attached hereto, made a part hereof, and marked "Exhibit A".

*After this Writ was served upon James P. Donovan, as attorney, and upon the other plaintiffs in the "Brown" suit (Civil Case No. 9276), the said James P. Donovan, in his own behalf and as attorney for the plaintiffs in the said "Brown" suit, filed this action against the Supreme Court of Texas and this Court of Civil Appeals, the nature of which is disclosed by the pleadings.

Wherefore, premises considered, defendants having answered prays that judgment be entered for defendants together with all costs incurred in these proceedings.

[fol. 594] Waggoner Carr, Attorney General of Texas;

Howard Mays, Assistant Attorney General, By:
Howard Mays, Attorneys for Defendants, Supreme Court Building, Austin 11, Texas.

Service (omitted in printing).

[fol. 595] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
No. CA-3-63-120

JAMES P. DONOVAN ET AL., Plaintiffs,

—vs.—

SUPREME COURT OF TEXAS, ET AL., Defendants.

MOTION OF THE PLAINTIFFS TO WITHDRAW CERTAIN PARTIES PLAINTIFF AND TO ADD NEW PARTIES PLAINTIFF—Filed May 9, 1963

To said Honorable Court:

Come now Plaintiffs in the above entitled and numbered cause, by their Attorney, James P. Donovan, and move this Court for an Order permitting the withdrawal of the following named persons as Plaintiffs in this cause, viz.: Harvey Bell, Faye Richardson, E. W. Quinton, Geneva Quinton, Dorothy Boland, Arthur G. Rudkin, Helen Rudkin, Jack H. Broom, Jane Broom, George B. Lotridge, Browning Lotridge, Lometta McDonald, J. D. Lowrie, Lillian Lowrie, Anna Marie Pylant, Calvin Pylant, Lewis

A. Park, Lola E. Park, S. A. Myrick, Dorothy Lusk Myrick, J. O. Garrett, Amy Rose Garrett, Paul Short, Besa Fairtrace Short, Arthur B. MacKinstry III, June C. MacKinstry, Dr. Grant Boland, Arvil Jarman, Mary Jarman, Evelyn Waldeman, Harvey Waldman, J. H. Huddleston;

Plaintiffs further move this Court for the addition of the following persons as Parties Plaintiff herein: William G. Byars, 9603 Overlake, Dallas, Texas; Mrs. L. A. Danek, 3024 Oradell Lane, Dallas, Texas; Audrey M. Karr, 5427 Bradford, Dallas, Texas; Russell G. Rogers, 2823 Kendale, Dallas, Texas; Caroline Rogers, 2823 Kendale, Dallas, Texas; Mrs. Arlene E. Davis, 5407 Bradford, Dallas, Texas; Donald S. Reckrey, 5407 Bradford, Dallas, Texas.

[fol. 596] Respectfully submitted,

James P. Donovan, Attorney for Plaintiffs, 30½
Highland Park Shopping Village, Dallas 5, Texas.

[fol. 597] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

No. CA-3-63-120

JAMES P. DONOVAN ET AL., Plaintiffs,

—vs.—

SUPREME COURT OF TEXAS, ET AL., Defendants.

ORDER DROPPING AND ADDING PLAINTIFFS—May 9, 1963

On this 9th day of May, 1963, came on to be heard Plaintiffs' Motion to drop certain parties Plaintiff from the above entitled and numbered cause, and to add other persons as Parties Plaintiff, and it appearing to this Court that said Motion should be granted, now therefore it is

Ordered, that the following named persons be and they are hereby permitted to withdraw as Plaintiffs in this cause, viz.: Harvey Bell, Faye Richardson, E. W. Quinton, Geneva Quinton, Dorothy Boland, Arthur G. Rudkin, Helen Rudkin, Jack H. Broom, Jane Broom, George B. Lotridge, Browning Lotridge, Lometta McDonald, J. D. Lowrie, Lillian Lowrie, Anna Marie Pylant, Calvin Pylant, Lewis A. Park, Lola E. Park, S. A. Myrick, Dorothy Lusk Myrick, J. O. Garrett, Amy Rose Garrett, Paul Short, Besa Fairtrace Short, Arthur B. MacKinstry III, June C. MacKinstry, Dr. Grant Boland, Arvil Jarman, Mary Jarman, Evelyn Waldeman, Harvey Waldman, J. H. Huddleston; and it is further

Ordered, that the following named persons be and they are hereby allowed to intervene as Plaintiffs herein: William G. Byars, Mrs. L. A. Danek, Audrey M. Karr, Russell G. Rogers, Caroline Rogers, Mrs. Arlene E. Davis, Donald [fol. 598] S. Reckrey.

Signed and entered: May 9, 1963.

Sarah T. Hughes, United States District Judge,
Northern District of Texas.

Approved as to form—Howard Mays, Atty. for Defendants.

[fol. 599] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
No. CA-3-63-120

JAMES P. DONOVAN, et al., Plaintiffs,
vs.
SUPREME COURT OF TEXAS, et al., Defendants.

MOTION TO STRIKE—Filed May 9, 1963

To Said Honorable Court:

Come now Plaintiffs in the above entitled and numbered cause, and respectfully show this Court as follows:

1.

That on the 8th day of May, 1963, Counsel for Plaintiffs received copies of Defendants' Motion to Dismiss and their Original Answer in the above entitled cause, said Motion and Answer being served and filed herein by Waggoner Carr Attorney General of Texas, Howard Mays Assistant Attorney General, By: Howard Mays (Signed).

2.

That Article 4, Section 22 of the Constitution of the State of Texas, expressly limits the authority of the Attorney General in the manner following: "He shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, * * *"

Article 4395 Revised Civil Statutes of Texas, as amended limits the authority of the Attorney General thus: "The Attorney General shall prosecute and defend all actions in the Supreme Court or the Courts of Civil Appeals in which the State may be interested."

[fol. 600]

3.

The Supreme Court of Texas has held that the Attorney General cannot intervene when a law suit involves only private rights; the most recent decision under the cited sections of the Constitution and Statute is that of State v. Harney 164 SW 2d 55, Error Refused, where the Court wrote: "As the powers and duties of the Attorney General are prescribed by the Constitution and Statutes, those powers must be limited to those so prescribed, and may not be enlarged by the courts."

4.

This cause involves only private rights and the Attorney General is prohibited by Constitution and Statute from appearing herein, to represent the named defendants, who are not the State of Texas; such an appearance is not only illegal but highly prejudicial to these Plaintiffs in that he attempts to lend the prestige of his high office in aid of the Defendants to prevent those Plaintiffs from litigating and securing their legal rights; it is contrary to Statute and the Constitution to permit the Attorney General to appear or file pleadings herein for Defendants.

Wherefore, Plaintiffs pray that the appearance of the Attorney General of the State of Texas herein in behalf of the Defendants be stricken from the record in this cause, and that the Motion to Dismiss and Original Answer filed by him in behalf of Defendants be also stricken from the record in this cause.

Respectfully submitted,

James P. Donovan, Attorney for Plaintiffs, 30½
Highland Park Shopping Village, Dallas, Texas.

[fol. 601] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
Civil Action File No. CA-3-63-120

JAMES P. DONOVAN, et al., Plaintiffs,

vs.

SUPREME COURT OF TEXAS, et al., Defendants.

ORDER OF THE COURT—May 16, 1963

This the 9th day of May, 1963, came on to be heard the above entitled and numbered cause and the Plaintiffs' application for a temporary injunction against the Defendants, all of the parties being represented by counsel. The Court first considered Plaintiffs' motion to bar the Attorney General of Texas from appearing as counsel for the Defendants and the Court is of the opinion that the motion is not well taken. Thereupon the Court considered the pleadings and argument of Counsel for all parties and is of the opinion that the temporary injunction should be denied.

It Is Therefore Ordered, Adjudged and Decreed that Plaintiffs' motion to bar the Attorney General from appearing as counsel for the Defendants is hereby overruled.

It Is Further Ordered, Adjudged and Decreed that Plaintiffs' application for a temporary injunction be in all things denied.

All costs are adjudged against the Plaintiffs, for all of which let execution issue.

Entered this 16 day of May, 1963.

Sarah T. Hughes, Judge Presiding.

Approved as to form:

James P. Donovan, Attorney for Plaintiffs.

[fol. 602]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
No. CA-3-63-120

JAMES P. DONOVAN, et al.,

vs.

ROBERT W. CALVERT, Chief Justice, State
Supreme Court, et al.,

Transcript of Proceedings—May 9, 1963

Be It Remembered that on the 9th day of May, 1963 before the Honorable Sarah T. Hughes, United States District Judge, and without a Jury, the following proceedings were had in the above styled and numbered cause:

APPEARANCES:

Mr. James P. Donovan, Dallas, Texas, For the Plaintiffs.

The Attorney General of the State of Texas, Austin Texas, By: Mr. Howard Mays, Mr. James S. Strock, For the Defendants.

[fol. 604]

Proceedings

The Court: Donovan versus the Supreme Court of Texas.

Mr. Donovan: Plaintiff is ready, Your Honor.

Mr. Mays: The Defendant is ready.

**MOTION TO WITHDRAW CERTAIN PLAINTIFFS AND TO ADD
NEW PLAINTIFFS AND ORDER GRANTING MOTION**

The Court: Mr. Donovan, I believe you have an Injunction Motion here?

Mr. Donovan: Yes, Your Honor, I have a Motion asking for permission to withdraw certain Plaintiffs from the action and to add new Plaintiffs. I filed that in the Clerk's Office, and I would at this time move for permission to withdraw the names of the named Parties and to add the other Parties who wish to come in.

The Court: You have no objection to that Motion?

Mr. Mays: Your Honor, I have no objection to the withdrawal of the named Plaintiffs, but would object unless Counsel assures the Court that those Plaintiffs being added have been admonished as to the Writ of Prohibition as issued by the Court of Civil Appeals.

The Court: I will ask him what the facts are in regard to that.

Mr. Donovan: Your Honor, the Plaintiffs asking to join have been advised of the fact that a Writ of Injunction has been served and that it applies to people of the Love Field area and that by coming into court they may be subject [fol. 605] to fine and imprisonment, and nobody has come in here except under written signature under that statement.

The Court: All right, the Order is entered granting you permission.

ARGUMENTS ON MOTIONS TO STRIKE AND RULING THEREON

Mr. Donovan: Now, the second Motion we have, Your Honor, as of yesterday there was served upon Plaintiffs' Counsel an appearance by the Attorney General of the State of Texas in behalf of the Defendants, the Supreme Court of Texas, and the Court of Civil Appeals, and in connection with that appearance, the Attorney General of the State filed a Motion to Dismiss this action, and also filed an Original Answer in behalf of these Defendants.

Now, we have this morning filed a Motion to Strike the appearance of the Attorney General, and to strike the Motion to Dismiss and to strike the Original Answer for the reason that the authority of the Attorney General is strictly defined by the Constitution of the State of Texas and by the statutes of the State of Texas, and that authority does not permit him to appear in a Federal Court. His authority

for representation of the State is limited to the Court of Civil Appeals in Texas and to the Texas Supreme Court.

His authority is also limited to representing the State and it has been held since about 1880 that the Attorney General has no right to intervene in matters involving private rights.

[fol. 606] It has also been held by the Court of Civil Appeals in San Antonio in 1942 in the case cited in our Motion that the Courts have no authority to extend the power or authority of the Attorney General beyond what is vested in him by statute or the Constitution, and that is the law of Texas as of the present date.

The action which is involved here is an action involving private rights. The Attorney General is not a party to it as such, and we respectfully submit to this Court that his appearance here is illegal. He is acting in excess of his authority. We feel that his appearance in this action attempts to bring behind the Defendants here the prestige of his office, which is expressly prohibited by the Constitution and statutes of Texas, and that that prestige could be very highly prejudicial to these Plaintiffs, and for that reason we ask that the appearance of the Attorney General, the filing of his Motion to Dismiss and his original action in behalf of the Defendants be stricken from the record.

The Court: Would you like to reply?

Mr. Mays: May it please the Court, Counsel is aware that the Attorney General of Texas, under the authority of many decisions, has represented all State officials, Commissions, Boards—in all courts, both State and Federal. This is not purely a suit involving private rights, but Counsel has named both courts, both the Supreme Court [fol. 607] of Texas and the Court of Civil Appeals of the Fifth Supreme Judicial District as Defendants in this suit, and we feel certainly that the Attorney General of Texas has a right and duty to appear in behalf of these named Defendants.

If the Court should feel otherwise, we would of course request leave to appear as *amicus curiae* before the Court.

The Court: I overrule the Motion. I read your brief and I also looked up the cases that you cited and read them.

I feel, however, that the Attorney General does have the right and the duty to represent all State officials in whatever court a case may be filed. While as far as the Plaintiffs are concerned, this is a private case, as far as the Defendants are concerned, they are sued in their capacity as members of the Supreme Court of Texas and the Court of Civil Appeals and not in their individual capacities. For that reason the Motion is overruled.

Mr. Donovan: Note my exception, Your Honor.

The Court: All right. You may draw the first Order with regard to the Parties, and I'll ask the State to draw the last Order.

ARGUMENT FOR TEMPORARY INJUNCTION.

By Mr. Donovan:

Now, if the Court please, the immediate matter before the Court this morning is the Application of the Plaintiffs in this suit for a temporary injunction against the Supreme Court of Texas and the Court of Civil Appeals of Texas [fol. 608] interference with the Plaintiffs in the Brown action, an action which is pending in this court and which was dismissed by this Court on last Thursday.

At the time of Dismissal, the Court stated that she would not act as a Court of Appeal from the Supreme Court of Texas.

Our position is not that we are asking this Court to act as a Court of Appeal from the Supreme Court of Texas. All that we are asking in this action is that this Court exercise its obligation and perform its duty to perfect its jurisdiction.

Unfortunately, this case should have been argued before the Brown case was dismissed. However, the settings weren't made that way and we find ourselves in a position now where the Brown case is dismissed, judgment has not yet been entered, and to protect our rights, we will be forced to appeal to the Circuit Court of Appeals.

We feel that in the Brown case we have asserted rights under Federal laws. We are attacking the validity of bonds

already issued and outstanding because of the denial of a right of election to the citizens of the City of Dallas.

We are attacking the conduct of the City of Dallas in the issuance of those bonds and charge that they have violated the postal laws of the United States and the [fol. 609] Security laws of the United States.

There is no question in our minds but what we have a right to test that case in Federal Court. We have a right to this Court's decision. We feel that this Court should not accept a decision by the Supreme Court of Texas, which we have contended, I might say unsuccessfully, was an action taken outside of its jurisdiction and in violation, as we believe, of the laws of the State of Texas.

Now, we feel that even though that Court were acting within its jurisdiction, that it invades the jurisdiction of the Federal Courts by coming in and telling these people that they cannot get a Federal Judge's ruling on their rights, and that's all we've ever asked for is a ruling.

The Mandamus itself which has brought out this Writ of Prohibition against us appears to violate every principle of law that has existed in the mandamus field since Texas began.

The Court itself in its fourteen page Opinion said that Mandamus will not apply to an act of discretion.

The development from that point is novel. The Court of Civil Appeals in November 1962 held that the mere filing of this suit and the prosecution of this suit was not an interference with the act of judgment which the Supreme Court admits is a judgment of the Court of Civil Appeals [fol. 610] and not of the Supreme Court.

Now, that would seem to involve judicial discretion. The decision resulted actually in a judgment, which must involve judicial discretion.

The Order which the Supreme Court entered was not a firm Writ of Mandamus, it was a suggestion to the Court of Civil Appeals that unless it did what it was told to do, the Mandamus would issue, and then the Court went on to find that this judicial discretion, that this act performed by the Court of Civil Appeals was not discretion, it had to hold that. In other words, it said the Court of Civil

Appeals didn't exercise any discretion in holding that there was no interference by filing suit in Federal Court, but we think there was interference.

Now, you've got two dispositions against each other, which is not proper for a Writ of Mandamus.

It then went on to find facts which the Court cannot do even on a regular Writ of Error on appeal. It went on to find that the facts here which have been in contest, which from time immemorial have been a reason for a denial of a Writ. The Court has consistently held until this decision that a question of fact will not be considered in an Application for Mandamus.

So, they resolved all the facts, they overturned the discretionary act of the Court of Civil Appeals, and then [fol. 611] suggested that the Court issue this Writ of Prohibition. That Writ was issued without any notice to these Plaintiffs, just signed and served, and in connection with it, the Court of Civil Appeals set aside the judgment, which was not even mentioned in this Supreme Court Order, the Judgment which became final in November 1962.

So that we feel that we are running into interference from the State courts which is depriving us of our Federal rights and of our right to have a judicial decision by a Federal Court on the Federal laws of the facts involved.

The only thing that has been argued here is that the Atkinson case is res adjudicata. The Court of Civil Appeals recognized the comity between the Federal and the State courts. They also recognize that res adjudicata can not be adduced until evidence is adduced. Res adjudicata cannot be applied. There are no provisions in the State law for any trial before those courts on these questions of fact and evidence. There is no provision for a record. There is no provision for a jury trial and these are all fact questions.

It appears to us that clearly the Court of Civil Appeals acting under the Supreme Court's invalid Order has interfered with the jurisdiction of this Court, and the Federal statutes are specific.

[fol. 612] Title 28, Section 1651 and Title 28 Section 2883 expressly give the District Courts authority to protect their jurisdiction by issuance of proper writs.

Now, that's what we're asking this Court for this morning. We're not asking this Court to say whether the Supreme Court of Texas and the Court of Civil Appeals in Dallas are right or wrong. We've got that battle going on on another front, but we are asking this Court this morning to perform its constitutional obligation, to give the Plaintiffs in this action their day in court under Federal law under Federal jurisdiction, and to permit them to adduce the facts in support of their pleadings, and to have this Court make a decision as to whether these facts are in support of issues which have already been decided by the State courts. If it turns out that that is true, then these Plaintiffs will not raise a single objection. However, we believe that our facts are based on things that happened after the Judgment in the Atkinson case of July 16, 1962.

We have contended that this action is different in that we are dealing here with outstanding bonds. We have bondholders before the Court.

We have the Attorney General in this action. The pleadings state very vaguely in the Brown case that of necessity the Attorney General must have approved these bonds. Well, that's not a very firm statement, and he should have [fol. 613] his records to be able to say he did approve them, and that's one of the grounds of attack on these bonds.

So, these issues were not in the Atkinson case, and if they were, our contention is that we have the right to have this Judge in this action in Federal Court, in this court, say those were issues involved here.

Under the Supreme Court decision, the only Judge in the world that can make a decision on res adjudicata as that decision now stands is the Judge who rendered the Judgment. I don't think that that's good law. I don't think the constant persecution of the Plaintiffs in these actions who are only asking to get into court with their proofs and have been denied that right consistently is right. The Atkinson case went out on summary judgment.

I think now, on the basis of the decision, the Atkinson case was probably right, but this case has issues of fact.

The City Government has joined issue with us, the bond investment houses have joined issues, the bond attorneys

have joined issues—they are all facts, and they cannot be decided by the Supreme Court of Texas.

Now, our contention is and our claim for relief here today is based upon the interference with the jurisdiction of this Court and our right under Federal jurisdiction.

As far as irreparable remedy is concerned, we have [fol. 614] still open to us on the Supreme Court decision, an Application for Writ of Certiorari for review of the Supreme Court's action, the past action of the Court of Civil Appeals and the anticipated action which we get probably next Monday.

Now, the danger to us of permitting this interference by the State courts without giving us our opportunity to be heard in Federal Court, is that when we file appeal after completion of this chain of action which is taking place in the State courts, the Supreme Court of the United States might well say to us this question is moot, and if that happens to us, then we are exposed to fine, we are exposed to being put in jail, and we are going to be denied our rights without ever having had an affirmative ruling by a Federal Court in this matter.

It is for these reasons that we respectfully ask this Court this morning to grant us a temporary injunction, pending trial of the action of Donovan against the Supreme Court, until such time as we can get a trial on the merits of this. All we're asking is that the Court hold this thing in status quo, to give us our rights to proceed under your jurisdiction, and we respectfully suggest that it is the obligation of this Court to defend its jurisdiction.

Thank you.

ARGUMENT AGAINST TEMPORARY INJUNCTION

By Mr. Mays:

If it please the Court, the members of the Supreme [fol. 615] Court of Texas and of the Court of Civil Appeals, Fifth Supreme Judicial District are not present in the courtroom, but they desired me to say to the Court that they stand at the pleasure of the Court and that they would be glad to come over if requested.

However, in this action, Counsel has just attempted to re-argue the Brown case, which this Court ordered dismissed last Thursday on May 2.

In the present case, I think we have questions of law only—no questions of fact to be presented, and of course the Atkinson case as the Court recognizes, went the entire route—all the way through the State courts and to the Supreme Court of the United States on Certiorari, and then the Brown case was filed in this court, the disposition of which the Court announced last Thursday.

We feel that this Court is without jurisdiction to entertain this request from Counsel for injunction in view of the provisions of Section 2283 of Title 28 of the United States Code. The Court is thoroughly familiar with that, and it's not my intention to go into it in detail, but to simply quote briefly from the decision of the Supreme Court of Texas in the mandamus action to the effect that this is a special type of proceedings in which the interference of the enforcement of the Judgment of the Court of Civil Appeals is complete just with the filing of this suit. In other words, [fol. 616] where bonds are involved and the sale of the bonds cannot be effectuated without the approval of the State Attorney General, and where that approval may not be issued where litigation is in progress attacking the validity of such bonds, then, you have a special situation, which the Supreme Court recognizes, in which the mere filing of a suit secures for the Plaintiff the same relief which they would have if an injunction were actually issued.

I will not prolong the argument. I believe the Court is familiar thoroughly with the Judgment of the Supreme Court of Texas in this case. I am convinced that this Court does not intend to act as the appellate court for the State courts in a matter of this kind.

We would therefore ask that the request for injunction be denied and our Motion to Dismiss be granted at this time.

Mr. Donovan: If the Court please, on the Motion to Dismiss—there has not been notice for a hearing, and I

think we are entitled to notice, under the rules, on a separate hearing on that. It was served on me yesterday.

Now, as to this contention which has been kicked around in about five courts now that this suit is the same as an injunction, let me state to this Court that Mr. Bickley in the argument before the Court of Civil Appeals in response to a question by Judge Claude Williams, which was in [fol. 617] substance, "Is there any legal impediment to the issuance of these bonds?" and Mr. Bickley, on behalf of the City of Dallas stated, "No", and under pressure he admitted that the only reason that bonds weren't sold was because buyers wouldn't buy them when there was a lawsuit.

Now, when we got into the Supreme Court—after briefs were closed and argument was had, the Attorney General who has been involved in this thing for about two years, came in with a supplemental brief, which is not provided for by the rules and in that brief they picked up a case which was cited somewhere back in the late 1800's, and all that case said was that the Court believed that it was the policy of the Attorney General's Department not to approve bonds when litigation was pending, and suggested that that should be the policy.

There hasn't been a statute pointed to any place, nor has there been a case pointed to by the opposition here, which says that this suit is a legal impediment to the sale of bonds. If they can find somebody crazy enough to buy these bonds tomorrow, they can sell them, and there is not a thing anybody can do about it. If the bond buyers are so doubtful of the situation they won't buy them, there must be something to our cause, and that's the cause we want to try in this court.

We feel also that there is more than a question of law [fol. 618] involved in this particular suit. The Court will recall that we have charged the Supreme Court of Texas and the Court of Civil Appeals, which we had to charge inadvertently because of the Supreme Court action, our main attack being directed against the Supreme Court—we have charged them with acting under color of law to

conspire to deprive these Plaintiffs of their rights. Now, that's a question of fact, not only a question of law, and we feel that in that connection, we are entitled to a jury trial on that matter, but that is a question for the Motion to Dismiss, and our main concern here this morning is for a temporary injunction to maintain the status quo until we can either prove we are right or have this Court find that we don't have the proof to sustain our position.

We respectfully request that the temporary injunction be granted.

The Court: This case was set down on the Motion for Temporary Injunction. It was not set down on the Motion to Dismiss.

What would you like to say with reference to that? Mr. Donovan desires to have notice. He was never given any notice.

Mr. Mays: If the Court please, we are willing to have Mr. Donovan notified as to a hearing on the Motion for Dismissal. However, the Court is fully cognizant of all the [fol. 619] ramifications of this case and Mr. Donovan is too, and I think the notice that Mr. Donovan should need actually should not be any longer than our notice we had on his Motion to Strike this morning, which we received about five minutes before Court convened.

The Court: I will set the Motion to Dismiss on Monday afternoon at 2 o'clock.

Mr. Donovan: Judge, may I say one thing on that point. I am under an Order of the Federal Court in Little Rock, Arkansas to appear at Lake Village on Monday morning at 10 o'clock. It's a personal Order directed to me in connection with the examination of Agriculture files.

I am also under a Citation for Contempt to appear at the Court of Civil Appeals.

The Court: How about Friday, tomorrow, at 2 o'clock?

Mr. Donovan: Well, I think I'm entitled to the regular notice, and that's what I'm going to request, Your Honor. I want some time here. I'll get killed before I get through with this thing, fighting different actions. I think under the rules I'm entitled to reasonable notice.

The Court: All right, we'll say next Thursday at 2 o'clock.

Mr. Donovan: That would be the 16th—that's agreeable to Counsel, Your Honor, if it is satisfactory to the Court.

[fol. 620] Mr. Mays: Judge, may I say one other thing—our Motion to Dismiss was pled as a defense to Counsel's complaints, and therefore, we would of course have liked to have argued it this morning, but whatever date the Court sets will be satisfactory to us.

The Court: I can hear it Thursday morning at 9:30. Is that satisfactory to all of you?

Mr. Donovan: Thursday, May 16 at 9:30?

The Court: Yes.

Mr. Mays: Yes, that is satisfactory with us.

Mr. Donovan: Thank you.

ORAL OPINION, HUGHES, J.—May 9, 1963

The Court: Now, with reference to this case, if you will recall, ~~both you and Mr. Bickley~~, though the City was not in the case, were here when you presented to me your Application for a Restraining Order. At that time, I understood, as you have stated today, that you disagreed with the Supreme Court, that you felt that they had gone beyond any previous decision and beyond the authority of the Supreme Court.

At that time I said to you that I thought that your remedy was a Writ of Certiorari to the Supreme Court of the United States and that I would set this case far enough off so that you could make some attempt to get it before the Supreme Court of the United States. This was filed on April 23 and I set it on this date in order to [fol. 621] give you some time.

Now, as I stated to you then and I state again, that I do not consider that the Federal District Court is the Appellate Court for the Supreme Court of Texas. I think your remedy is before the Supreme Court of the United States.

In the second place, the Brown case was dismissed last Thursday and there is nothing here.

Your application is to restrain the Supreme Court of Texas and the Court of Civil Appeals from interfering with you in prosecuting a case which has now been dismissed, so that I consider it moot.

However, I am going to give you all your hearings and this Application for the Temporary Injunction is denied, but you still have an Application for a Permanent Injunction, and you still have the Motion of the State to Dismiss, which I am setting on next Thursday; May 16, at 9:30.

Any further question?

Mr. Donovan: If the Court please, I would like to state for the record that the reason that the Application for Certiorari has not been made by Plaintiffs is because we are of the belief that the action which is presently pending involving the contempt citation of the Court of Civil Appeals is all part of the one matter which should go to the Supreme Court on appeal.

In other words, we had a nebulous Order in the Supreme [fol. 622] Court Opinion. It was a suggestion rather than a firm Order.

The Court: May I suggest to you that the Supreme Court of Texas as far as I know never orders a lower court to do anything in the first instance. They write an Opinion and then expect that Court, the lower Court, to comply with the Opinion, so I'm not surprised that they didn't issue a Mandamus. The Court of Civil Appeals is supposed to abide by the Order of the Supreme Court without an Order.

I would like to say that I have been in that same position when I was on the State Court and I found that the Supreme Court didn't order me to do something, they just suggested that I do it and said that they were sure I would comply.

Mr. Donovan: What I am saying to the Court is that I am aware of that custom and I know how it is done, but what I am saying to the Court is that if we went up just from the Supreme Court Order, we had at that point suffered no damage or had any interference, but in order to make that an appealable matter—an appealable order and a justiciable matter, for review by the Supreme Court

we had to have action and we're getting it now. We have a Writ of Prohibition served and now we have the Citation of Contempt. I think when that action is completed before the Court of Civil Appeals, then we are in a position [fol. 623] to apply for our Writ of Certiorari reviewing the whole thing, and we will have a justiciable matter for review. I wanted to make clear to the Court my reason for not accepting your advice.

The Court: Anything else?

Mr. Donovan: That's all, Your Honor.

Mr. Mays: That's all.

The Court: All right, we stand recessed.

Proceedings Recessed

[fol. 624] Reporter's Certificate to foregoing transcript
(omitted in printing).

[fol. 625]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

CA-3-63-120

JAMES P. DONOVAN, et al.

vs.

ROBERT W. CALVERT, Chief Justice,
State Supreme Court, et al.

Transcript of Proceedings—May 16, 1963

Be It Remembered that on the 16th day of May, 1963 before the Honorable Sarah T. Hughes, United States District Judge, and without a Jury, the following proceedings were had in the above styled and numbered cause:

APPEARANCES:

Mr. James P. Donovan, Dallas, Texas, For the Plaintiffs.

The Attorney General of the State of Texas, By: Mr. Howard Mays, Mr. James S. Strock, Austin, Tex., For the Defendants.

[fol. 627]

Proceedings—May 16, 1963

The Court: What is the style of your case, Mr. Donovan?

Mr. Donovan: It is *James P. Donovan, et al. versus State Supreme Court of Texas, et al.*

The Court: All right, I believe it's your Motion, is it not?

Mr. Donovan: Yes, it is Mr. Mays'.

Mr. Mays: Yes, Your Honor. The Defendant's Motion to Dismiss the action on the grounds that it is fraudulent, this Court having no jurisdiction over the subject matter, and I believe the Court is familiar with the questions presented here by this Motion.

I would say again to the Court very briefly, that we feel that this is an attempt by Counsel to have this Court serve as an appellant court for the Supreme Court of Texas and also for the Court of Civil Appeals of the Fifth Supreme Judicial District of Texas, and we would therefore move the Court to dismiss this cause at this time.

The Court: What do you have to say, Mr. Donovan?

Mr. Donovan: Well, if the Court please, I think I have argued this about five times.

The Court: And I think I've set it down for you to argue again, didn't I?

Mr. Donovan: That's right.

[fol. 628] If the Court please, I wish to move for the striking of extraneous matter to the pleadings from consideration under this Motion under Rule 12, and if that Motion be granted, then my argument would take one course.

The Court: What do you consider extraneous?

Mr. Donovan: Well, they have attached exhibits and things to the Motion to Dismiss which are not part of the pleadings. They have brought in all of the Supreme Court Opinions which they attached to their Motion—the papers.

The Court: Well, if you want to argue that Motion to Strike, go right ahead.

ARGUMENTS ON MOTION TO STRIKE AND RULING THEREON

Mr. Donovan: My position on that is that under Rule 12, if matter extraneous to the pleadings is to be considered, then the Court must treat it as a Motion for Summary Judgment and so rule, in which event, then we should be given time to submit proper affidavits in opposition to the Motion as a Motion for Summary Judgment.

The Court: Does the State wish to reply?

Mr. Mays: Your Honor will recall that our Motion to Dismiss was made along with our Answer to Mr. Donovan's Original Complaint, and we feel that the exhibits were not extraneous, either to the Answer or to the Motion.

The Court: I overrule the Motion.

Mr. Donovan: All right, Your Honor. Note our exception.
[fol. 629]

ARGUMENTS ON MOTION TO DISMISS

Mr. Donovan: Then, as to the contention of the attorney for the Defendants here, he states that we're trying to use this Court as a Court of Appeal to the Supreme Court and the Court of Civil Appeals, and our position is that we are not asking this Court in this injunction suit to rule whether they are right or wrong. We don't care, as far as this action is concerned; as to the question of whether or not their decisions are correct.

Our position is the same—that we have a suit pending in this court, Brown against the United States, and that that suit involves matters which are charged to be violations of the laws of the United States and which it's claimed give rise to a cause of action under Federal law and the Federal Constitution, of which this Court has jurisdiction.

The only thing we're asking this Court to do in the injunction suit is to tell these local courts to leave us alone. Let us try our Federal cause under Federal jurisdiction and get a Federal decision.

We don't think that this Court is compelled to accept the Opinion of the Supreme Court of Texas in a proceeding

where by Mandamus they attempted to reverse a Judgment, which is contrary to all precedent in Texas. We do not feel that this Court is to be concerned in any way with the [fol. 630] correctness or incorrectness of those decisions in the State Court, but that this Court is obligated and has the duty to see to it that we have a right to try our rights in Federal Court, and to that end we ask that the interference which has been consistent by the Supreme Court of Texas and by the Court of Civil Appeals, under an Order from the Supreme Court of Texas. We ask that they be further enjoined from further interference of our prosecution of our Federal suit.

We think and we allege in this Motion under 1651 that it is specifically provided that the District Courts of the United States have the power to protect their jurisdiction, and other sections of the Code cited power is also recognized to that effect.

Now, we are not asking for any decision by this Court as to whether the Supreme Court is right or wrong. We are still asking that we be permitted to go ahead and try our suit here under this Court's jurisdiction and get this Court's decision as to whether we are right or wrong, and as to all the other matters.

That is our position and we respectfully request that it be granted.

Mr. Mays: May I say one word?

The Court: Yes.

Mr. Mays: I believe the Court will recognize that Mr. Donovan's argument there is beside the point for the reason [fol. 631] son that there is this, and this whole question is moot, the Brown Case not actually being before the Court at this time, having been dismissed.

Mr. Donovan: If the Court please, it might save some argument if I notify the Court that we have filed a notice of appeal and have posted bond with the Fifth Circuit so the case is not dismissed. it is still pending.

ORAL OPINION, HUGHES, J., May 16, 1963

The Court: For the reasons previously stated, and without repeating, the Motion to Dismiss is sustained.

Mr. Donovan: Note our exception.
The Court: That is all.

Proceedings Concluded

[fol. 632] Reporter's Certificate to foregoing transcript
(omitted in printing).

[fol. 633] [File endorsement omitted].

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
No. CA-3-63-120

JAMES P. DONOVAN, et al., Plaintiffs

v.

SUPREME COURT OF TEXAS, et al., Defendants

ORDER OF COURT DISMISSING SUIT—June 21, 1963

This the 16th day of May, 1963, came on to be heard the above entitled and numbered cause on the motion of the Defendants to dismiss, and all parties having appeared by counsel, the Court having considered the motion to dismiss and the argument of counsel, and having considered the motion of the Plaintiffs to exclude matters alleged by them to be extraneous, being the exhibits attached to Defendants' Answer and Motion to Dismiss, is of the opinion that the Plaintiffs' motion should be overruled and that the Defendants' Motion to Dismiss should be granted.

It Is, Therefore, Ordered, Adjudged and Decreed that the Plaintiffs' motion to exclude the exhibits attached to Defendants' pleadings as being extraneous is hereby overruled.

It Is Further Ordered, Adjudged and Decreed that the Defendants' Motion to Dismiss be and it is in all things hereby granted, and said cause is dismissed.

All costs herein are adjudged against the Plaintiffs, for all of which let execution issue.

Entered this the 21 day of June, 1963.

Sarah T. Hughes, Judge Presiding.

Approved as to Form:

James P. Donovan, Attorney for Plaintiffs.

[fol. 634] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 635]

SUPREME COURT OF THE UNITED STATES

No. 264—October Term, 1963

JAMES P. DONOVAN, et al., Petitioners,

vs.

CITY OF DALLAS, et al.

ORDER ALLOWING CERTIORARI—October 21, 1963

The petition herein for writs of certiorari to the Supreme Court of the State of Texas and the Court of Civil Appeals of the State of Texas, Fifth Supreme Judicial District is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writs.

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JUL 9 1963

JOHN F. DAVIS, CLERK

264
No.

In the

Supreme Court of the United States
OCTOBER TERM 1963

JAMES P. DONOVAN, *et. al.*,

Petitioners,

v.

CITY OF DALLAS, *et. al.*,

Respondents.

**APPLICATION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF TEXAS, THE COURT OF CIVIL
APPEALS, 5TH SUPREME JUDICIAL DISTRICT OF
TEXAS AND THE UNITED STATES DISTRICT
COURT, NORTHERN DISTRICT OF TEXAS**

PETITION

JAMES P. DONOVAN,
30½ Highland Park Shopping
Village, Dallas 5, Texas,
Attorney for Petitioners.

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No.

In the

Supreme Court of the United States

OCTOBER TERM 1963

JAMES P. DONOVAN, et. al.,

Petitioners,

v.

CITY OF DALLAS, et al.,

Respondents.

JURISDICTIONAL STATEMENT

PETITIONERS

The parties to the proceedings hereinafter mentioned, in whose behalf this Petition for Writ of Certiorari is filed are: James P. Donovan, Austin Crow, Alberta R. Crow, William C. Isom, Juanita Isom, C. D. Crudgington, U. J. Boland, Dorothy Boland, H. P. McDonald, Russell G. Rogers, Caroline Rogers, Daniel C. Brown, Mary Brown, M. J. Pellillo, P. D. King, Nancy King, J. W. Slaughter, Jr., Christine C. Slaughter, J. H. Parr, Joan S. Parr, Walter Sodeman, George Atkinson, W. H. Richardson,

Mrs. L. A. Danek, L. A. Danek, Donald S. Reckrey, Mrs. Arlene E. Davis, R. L. Pitt, Pauline Pitt, Paul H. Crawford, Frank Grimes, Lena Mae Grimes, J. W. Tomlin, Charline Tomlin, Zelma Pellillo, Audrey M. Karr, Patricia Dukelow, Martin E. Collis, Jr., Norma June Collis, James E. Strum, Linnis Strum, James W. Odom, Helen Odom, Dr. Hobson Crook, Russell Moore Crook, Alberta M. Turrill.

OPINIONS BELOW

The opinion of the Supreme Court of Texas in *City of Dallas v. Dixon* is reported in *365 S. W. 2d at page 919*, and is set out in the Appendix hereto—Pages 1a-15a.

The opinion of the Court of Civil Appeals in the case of *City of Dallas v. Brown* is reported in *362 S. W. 2d at page 372*, and is set out in the Appendix hereto, Pages 16a-26a.

The opinion rendered by the Court of Civil Appeals in the Contempt Proceeding ancillary to *City of Dallas v. Brown* is unreported but is set out in the Appendix hereto at Pages 27a-38a.

Oral opinions rendered by the United States District Court in *Donovan et al., v. Supreme Court of Texas et al.*, are unreported but are set out in the Appendix hereto at Page 39a.

The Oral Opinion rendered by the United States District Court in *Brown v. City of Dallas* is unreported but is set out in the Appendix hereto at Page 40a.

JURISDICTION

The Judgments in the cases sought to be reviewed herein are as follows:

Supreme Court of Texas, entered March 13, 1963 (App. p. 41a), Motion for Rehearing Denied, April 10, 1963 (App. p. 43a).

Court of Civil Appeals Judgment of Contempt entered May 22, 1963 in *City of Dallas v. Brown* (App. p. 44a).

United States District Court Judgments dismissing *Brown v. City of Dallas* entered May 9, 1963 (App. p. 55a), and Appeal to Circuit Court of Appeals 5th Circuit entered June 10, 1963 (App. p. 56a).

United States District Court Judgment dismissing *Donovan et al. v. Supreme Court of Texas, et al.*, entered May 21, 1963 (App. p. 57a).

The Judgment of the Supreme Court of Texas, granted the Application of the City of Dallas et al.; for a Writ of Mandamus addressed to the Court of Civil Appeals, 5th Supreme Judicial District of Texas, directing that Court to issue a Writ of Prohibition against Petitioners prohibiting them from prosecuting their suit entitled *Brown et al. v. City of Dallas et al.*, then pending in the United States District Court, Northern District of Texas; the Judgment of the Court of Civil Appeals concluded a contempt proceeding based upon alleged orders of that Court issued pursuant to the Supreme Court of Texas Judgment restraining Petitioners from prosecution of the aforementioned Federal suit and in addition punishing Petitioners

for having filed the action *Donovan et al. v. Supreme Court of Texas et al.* in Federal Court seeking an injunction against the State Courts' interference with prosecution of the *Brown* suit; the Court of Civil Appeals Judgment sentenced Petitioners' Attorney to jail for twenty days for contempt and imposed fines of \$17,400 against Plaintiffs in the Federal case for refusing to obey the alleged Writ of Prohibition issued against Petitioners' prosecution of the *Brown* suit in the United States District Court. The United States District Court Judgment dismissing the *Brown* suit was predicated upon the alleged Writ of Prohibition issued by the Court of Civil Appeals, and the Judgment of the District Court dismissing the Petitioners' Appeal to the Court of Appeals 5th Circuit was granted upon Petitioners' Application made under duress (threats of further fines and imprisonment) exerted by the State Court of Civil Appeals, 5th District of Texas. The Judgment of the United States District Court dismissing *Donovan et al. v. the Supreme Court of Texas et al.* was predicated upon the conclusion that the case was moot (because of the dismissal of the *Brown* case) even though an appeal was then pending, and upon the further ground that the District Court would not act as a Court of Appeal from the Texas courts.

The Jurisdiction of this Court to review by Writ of Certiorari the aforementioned Judgments is conferred by Title 28 U. S. C. Section 1257, said Judgments being entered in violation of Article III and Amendments V, VIII, and XIV of the Constitution of the United States and the applicable Federal Statutes.

QUESTIONS PRESENTED

1. May the Supreme Court of Texas, acting *without* appellate jurisdiction, mandamus the reversal of the judgment of another State Court, directing the trial court to prohibit Petitioners from further prosecuting a pending Federal Court action, thereby usurping the Judicial Power vested in the United States Courts by the Constitution and Statutes of the United States?
2. May the Supreme Court of Texas usurp the judicial power of the United States District Court to determine a plea of *res adjudicata* pleaded in a pending Federal Court action?
3. May the Supreme Court of Texas exercise jurisdiction not granted by the Texas Constitution and Statutes to prevent further prosecution of a pending Federal Court action?
4. May the Texas Court of Civil Appeals, *without notice to parties to a final judgment*, reverse a judgment denying a Writ of Prohibition and issue such a Writ to prohibit Petitioners from prosecuting a pending suit in Federal Court?
5. May the Texas Court of Civil Appeals, *without issuance of legal process or service thereof according to law*, fine 85 citizens \$17,400 for attempting to prosecute their rights under Federal Law in a pending Federal Court action; and were such fines excessive and unconstitutional?
6. May the Texas Court of Civil Appeals fine the Petitioners and sentence their lawyer to jail, for filing an

injunction action in Federal Court seeking restraint of State Courts' interference with their pending Federal action, when no prohibition existed against such injunction suit?

7. May the United States District Court abandon its jurisdiction by substituting for its judgment the judgment of a State Court to dismiss a pending Federal suit, and aid in the enforcement of a State order, illegally entered, by dismissing Petitioners' Appeal to the Court of Appeals, Fifth Circuit upon Petitioners' request filed under State Court threats of fine and imprisonment?

8. May Petitioners be convicted of contempt after a hearing in which no legal proof of the existence of a valid court order, under which Petitioners were cited to show cause as to why they should not be punished for contempt, was offered, and in which no proof of the legal service of such order was tendered?

Relevant Constitutional and Statutory Provisions

Constitution of the United States:

Article III. Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * *

Article IV. Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. ***

Amendment V. No person shall be *** deprived of life, liberty, or property, without due process of law; ***

Amendment VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV. Section 1. *** No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. ***

Title 42 U. S. C. Section 1971. All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race color, or previous condition of servitude; any constitution, law, custom, usage or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

Title 42 U. S. C. Section 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts,

to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to not other.

Title 42 U. S. C. Section 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42 U. S. C. Section 1985 (2). If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, * * * or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; * * *

Title 15 U. S. C. Section 77q. Fraudulent interstate transactions (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. * * *

(c) The exemptions provided in section 77c of this Title shall not apply to the provisions of this section.

Title 15 U. S. C. Section 77v. (a) The district courts of the United States, and the United States Courts of any territory, shall have jurisdiction of offenses and violations under this subchapter * * * and concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. * * *

Title 28 U. S. C. Section 1331. The District Courts shall have original jurisdiction of all civil actions wherein the

matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Title 28 U. S. C. Section 1343. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * *

(3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Title 28 U. S. C. Section 2283. A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Title 28 U. S. C. Section 1651. (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. * * *

◦ *Texas Constitution Article 5, Section 3.* The Supreme Court shall have appellate jurisdiction only except as herein

specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. * * *

Revised Civil Statutes of Texas, Article 1733. The Supreme Court or any Justice thereof, shall have power to issue writs of procedendo, certiorari and all writs of quo warranto or mandamus *agreeable to the principles of law regulating such writs*, against any district judge, or Court of Civil Appeals or judges thereof, or any officer of the State Government, except the Governor. (Italics ours.)

STATEMENT OF THE CASE

Because of the involved nature of the proceedings which are here under review, Petitioners will state the cases heretofore decided in chronological order as they occurred:

THE ATKINSON CASE

On April 3, 1961 George Atkinson and 43 other Plaintiffs filed suit against the City of Dallas, Texas, seeking an injunction against the construction of a new parallel runway at Love Field, Texas: that suit went to Judgment on Plaintiffs' First Amended Original Petition which prayed for an injunction against the construction and use of said runway on the following grounds: threatened seizure of Plaintiffs' air rights without first making compensation therefor; irreparable damage to Plaintiffs through operation of jet aircraft over their property; the action of the

City was ultra vires and contrary to Federal Regulations and Standards of Safety; the use of the runway would constitute a nuisance; the construction was not in the public interest, not a public convenience or necessity and the City Council action was arbitrary and capricious; the *proposed* issue of bonds was unconstitutional, illegal and void. The Judgment was entered on a Motion for Summary Judgment, and an appeal taken to the Court of Civil Appeals, 5th Supreme Judicial District of Texas, which Court affirmed and wrote an opinion. An application to the Supreme Court of Texas for Writ of Error was made, and the Writ refused with the notation "N. R. E." That notation according to the Texas Rules of Civil Procedure (Rule 483) means: "In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation "Refused. No Reversible Error." The Supreme Court Judgment denying the Application for Writ of Error became final on March 14, 1962. Plaintiffs sought review by this Court on Certiorari, their Petition being denied on June 25, 1962. Petitioners' Motion for Rehearing was denied on October 8, 1962.

The *Atkinson* case was a class action with 42 Plaintiffs representing: "the home owners, families and individuals who live, work, reside and attend schools, churches and other community centers in the area embraced within the approach areas of planned runway 13R/31L:". It was not

a taxpayers' action; the only Defendant in the action was the City of Dallas; the validity of *outstanding revenue bonds* of the City of Dallas could not have been questioned in that action because of the *lack of necessary defendants, the holders of such outstanding bonds.*

This case was numbered 1028 on the Supreme Court Calendar for the October Term 1961 under the style *George S. Atkinson et al. v. City of Dallas.*

THE BROWN CASE

The official title of this case is *Daniel C. Brown et al. v. City of Dallas et al.*, Civil Cause No. 9276 in the United States District Court for the Northern District of Texas. This action was filed on September 24, 1962, one year and seventy days after the Judgment in the *Atkinson* case. The Plaintiffs in this Federal suit included 32 persons who had been Plaintiffs in the *Atkinson* suit, joined by an additional 90 persons who had *not* been in the *Atkinson* case. The Defendants in this Federal action included the City of Dallas, Dallas City Officials, a firm of Attorneys who had certified through interstate commerce as to the legality of outstanding airport revenue bonds of the City of Dallas and a group of individuals sued as holders of such outstanding bonds, and as representatives of the class consisting of the holders of all outstanding airport revenue bonds of the City of Dallas (*Brown Case Record p. 2*).

The Plaintiffs in this Federal case alleged a cause of action based on the Civil Rights Laws of the United States, the Securities Exchange Act, Postal Laws of the United

States and the 14th Amendment to the Constitution of the United States. (*Brown Case Record* pp. 2-11).

Plaintiffs claimed a denial of due process of law and a deprivation of civil rights by reason of the defendant City of Dallas having sold 8 separate issues of Love Field Airport Revenue Bonds, totaling \$16,400,000, without having such issues approved at a taxpayers' election as required by the Texas Municipal Airports Act; the individual Defendants were charged with conspiracy to violate the Federal laws mentioned above. In addition, as of September 24, 1962, Plaintiffs charged Defendants with conspiring together to deprive Plaintiffs, under color of law, of their Constitutional rights by constructing a parallel runway at Love Field in violation of United States Statutes, Regulations adopted thereunder and Texas Statutes (*Brown Case Record* pp. 8 & 10).

Plaintiffs' prayer for relief in this Federal case was for an injunction against Defendant City and City Officials making payments from Dallas City funds on the above mentioned outstanding Airport Revenue Bonds; an injunction against construction of any parallel instrument runway within the then existing limits of Love Field; an injunction against Defendants' further violation of United States Securities laws; and a declaratory judgment holding Airport Revenue Bonds Series 323, 352, 363, 364, 370, 371, 390 and 15 null and void and not an obligation of the City of Dallas.

It is to be noted that neither the Parties Plaintiff, Parties Defendant, nor the issues raised in the Brown case were the same as those in the Atkinson case (Brown case record pp. 1-11; Mandamus record pp. 11-28, 45-54, Item # 4).

On September 25, 1962 the Defendants in this Federal action appeared by H. P. Kucera and N. Alex Bickley and filed a "Motion to Advance" (Brown case record pp. 12-15); on October 3, 1962 Plaintiffs filed an Answer to said Motion to Advance (idem pp. 31, 32); on October 4, 1962 Defendants replied to Plaintiffs' Cross Motion to strike appearances (idem pp. 33-35).

Meanwhile on October 2, 1962, the Defendants in the Brown suit filed an Application for a Writ of Prohibition with the Court of Civil Appeals, 5th District praying for prohibition of Plaintiffs' further prosecution of their Brown suit (Brown case record pp. 54-73).

On October 8, 1962 Plaintiffs in the Federal case filed an Application with the United States District Court to stay proceedings in the State Court on the Application for Writ of Prohibition; Defendants' Attorneys answered for themselves and the Court of Civil Appeals on October 10, 1962 (Brown case record pp. 46-53). The United States District Court denied the requested stay of State Court proceedings on the basis of comity (Idem pp. 154-156). On October 12, 1962 all Defendants joined issue by filing a Motion to Dismiss and an Original Answer, both including a plea of res adjudicata predicated on the Atkinson case (Idem pp. 118-125). No hearing was had on Defendants'

Motion to Dismiss until after Defendant, on April 24, 1963, filed a Supplemental Motion to Dismiss (Idem pp. 161-183) incorporating therein the Supreme Court of Texas Mandamus and the alleged Writ of Prohibition by the Court of Civil Appeals. On May 2, 1963 Plaintiffs made a Motion to drop certain party plaintiffs and to add new ones, and filed an answer to Defendants' Motion and supplemental Motion to Dismiss praying for the exclusion of extraneous matter from consideration in determining the Motion to Dismiss and in the alternative for a continuance to reply to said Motions as on Motion for Summary Judgment under Rule 12 Federal Rules of Civil Procedure (Idem pp. 184-187). The Motion for leave to add and drop Plaintiffs was granted; the other Motions were denied. After hearing on May 2, 1963 the United States District Court dismissed the case saying: "You and the litigants in this case have been prohibited from proceeding in this case and therefore I dismiss the case" (Idem pp. 210). An Order of Dismissal was entered May 9, 1963 (Idem p. 213). Petitioner Plaintiffs filed Notice of Appeal from said Order of Dismissal and posted the required bond on May 15, 1963 (Idem pp. 219-224).

On May 22, 1963, the Petitioner Plaintiffs were adjudged guilty of contempt of court as hereinafter set forth, fined \$17,400 and their lawyer jailed for twenty days. While said lawyer was in jail, the Court of Civil Appeals threatened Petitioners with further fines and imprisonment if they did not dismiss the Appeal. Under this duress, the District Judge cooperating with the Court of Civil Appeals,

dismissed the Parties Plaintiff while their Counsel was in jail, and entered a final order dismissing the Appeal on June 14, 1963 (*Brown* case record pp. 225-272).

WRIT OF PROHIBITION CASE

The official title of this case was No. 16,193 in the Court of Civil Appeals, 5th Supreme Judicial District of Texas; the style, *City of Dallas et al., Petitioners v. Daniel C. Brown, et al., Respondents*.

This action was in the nature of an original proceeding before the Court of Civil Appeals whose determination thereof is by Texas law final and not subject to review by Appeal. The Petition for Writ of Prohibition named as Respondents the Plaintiffs in the *Brown* case in Federal Court and their Attorney; the Petitioners were identical with the Defendants in the *Brown* case. The Petition prayed for a Writ of Prohibition against the Respondents restraining them from further prosecution of the *Brown* case in the United States District Court. The only ground offered by Petitioners to justify the Writ and Orders ancillary thereto was that the *Atkinson* case was *res adjudicata* of all issues raised in the *Brown* case, and the filing of the *Brown* action constituted an interference with the Judgment in the *Atkinson* case (*Brown* case record pp. 54-73). The Court of Civil Appeals denied Petitioners' Application for Writ of Prohibition, holding in its written opinion that the filing of the *Brown* suit did not constitute an interference with its Judgment in the *Atkinson* suit, and declining to rule on the question of *res adjudicata*. The Court split

two to one, the majority stating "It is with regret that the majority of our court feel impelled under the circumstances to decline to order the writ of prohibition to issue" (Prohibition case record pp. 1-11). The Court of Civil Appeals denied Petitioners' Motion for Rehearing.

MANDAMUS CASE

The official style of this case filed in the Supreme Court of Texas as an Original Mandamus Proceeding is No. A-9340 *City of Dallas et al. v. Honorable Dick Dixon et al.* The Petitioners were the same as those who had applied for, and been denied a Writ of Prohibition by the Court of Civil Appeals; they were also identical with the Plaintiffs in the *Brown* case. The Respondents in this Mandamus proceeding were identical with the Respondents in the Prohibition case and the *Brown* case except for the addition of three new Respondents, the Judges of the Court of Civil Appeals (Mandamus Case Record—Items 1, 2, 3, 4). The Petition for Mandamus alleged the history of the *Atkinson* and *Brown* cases and the Writ of Prohibition case, renewed the same argument and prayed for a Mandamus directing the Court of Civil Appeals to grant the relief prayed for in the Writ of Prohibition case (Mandamus Case Record—Item #3, pp. 1-9).

The Respondents, Petitioners herein, filed an answer to said Petition for Mandamus (Mandamus Case Record—Item #6, pp. I-IV) alleging in paragraph 15 (p. V) that the grant of the relief prayed for would be unconstitutional and void and in violation of the rights guaranteed Respondents by the Constitution and laws of the United States.

After hearing the Supreme Court of Texas wrote an opinion (App. p. 1a; Mandamus Case Record Item #9) and entered the Judgment sought to be reviewed (Idem #10). Motion for Rehearing was denied April 10, 1963 (Idem Item #14).

THE CONTEMPT CASE

Technically this case in an ancillary proceeding to Court of Civil Appeals cause heretofore reviewed under the heading "Writ of Prohibition Case": *City of Dallas et al. v. Daniel C. Brown et al.* No. 16,193.

Following the entry by the Supreme Court of Texas of its Order Granting the Application for Writ of Mandamus, and denying rehearing thereon, the Supreme Court sent a certified copy of its Order to the Court of Civil Appeals.

Upon Application of the City Attorney of the City of Dallas, the Chief Justice of the Court of Civil Appeals, *without notice to any party*, signed an Order described as a "Writ of Prohibition and Ancillary Orders" on April 16, 1963 (Contempt Case Record—Item #1). This Order was not sealed with the seal of the Court, nor did the Clerk's signature appear thereon as required by Rule 394 of the Texas Rules of Civil Procedure which reads as follows: "Any writ or process issuing from any Court of Civil Appeals shall bear the teste of the Chief Justice under the seal of said court and be signed by the clerk thereof, and unless otherwise expressly provided by law or these rules, shall be directed to the party or court to be served, and may be served by the sheriff or any constable of any county of the

State of Texas within which such person to be served may be found, and shall be returned to the court from which it issued. Whenever such writ or process shall not be executed, the clerk of such court shall issue another like process or writ upon the application of the party suing out the former writ or process." An examination of said "Item 1" reveals that the alleged writ was invalid and void for the following reasons:

1. it was not signed by the Chief Justice under the seal of the Court; no seal appears thereon;
2. it was not signed by the Clerk;
3. it was not directed to the party or the Court to be served;

While said alleged Writ recites that "a copy of this Order has been served in person" upon James P. Donovan, the testimony in the Contempt hearing (*City of Dallas v. Daniel C. Brown*, No. 16193, page 162, F. 18-21) demonstrates that no such order was personally handed to said Attorney.

Upon conclusion of the contempt hearing the Court requested the opposing litigants to submit proposed judgments (Idem p. 220). The record is void of any proof of service of the alleged Writ of Prohibition upon any of the parties charged with contempt. The rule quoted requires service of process by a constable or sheriff, and the only testimony offered on proof of service is alleged mailing by ordinary mail.

On May 22, 1963, the Court of Civil Appeals entered Judgment (Contempt Case Record—Item 2) finding 50 persons guilty of contempt in that they "(a) failed to request the United States District Court to dismiss Cause No. 9276, styled Daniel C. Brown, et al v. City of Dallas et al.; (b) Contested the dismissal of the cause of Daniel C. Brown et al., v. City of Dallas et al., pending in the United States District Court; (c) Took exception preparatory to appeal of the order of the United States District Court dismissing Cause No. 9276 styled Daniel C. Brown et al., v. City of Dallas et al., ; and (d) Filed Cause No. CA-3-63-120 Civil, in the United States District Court styled James P. Donovan et al., v. The Supreme Court of Texas, et al.:" The Court found one person guilty of contempt on counts listed as (b), (c), and (d) above and an added count of having "joined as a party Plaintiff in Cause No. 9276 in the United States District Court styled Daniel C. Brown v. City of Dallas et al." The Court then found another six persons guilty of contempt for joinder in the *Brown* action and the earlier grounds (b) and (c). The Court then found 26 more persons in contempt for filing Cause No. CA-1-3-63-120 in the United States District Court styled *James P. Donovan et al. v. The Supreme Court of Texas et al.*, two of these persons never having been served with process. Finally the Court found 4 persons guilty of contempt for reasons (a) (b) and (c) charged against the first 50. It then absolved all persons who had appeared in person or by an Attorney other than James P. Donovan of all contempt even though their actions had been identical with those of others adjudged in contempt.

As to Petitioners' Attorney, the Judgment adjudged him to be in contempt of Court without specification of the contempt and sentenced him to 20 days in Dallas County Jail without bail; all others held in contempt were fined \$200 each.

Although the Judgment was entered May 22, 1963, the Court's opinion was not written until June 7, 1963 (Contempt Case record—Item #3). No formal Order denying Petitioners' Motion for Judgment including findings of fact and conclusions of law appears to have been entered of record.

The Motion to punish for contempt filed by the City of Dallas appears of record (Contempt Case record Item #5) and the Petitioners' Motion to Quash and Answer raising the constitutionality of the contempt action appears as Item #7 of the Contempt Case Record.

Judgments amending the Original Contempt Judgment in the absence of Counsel who was in jail are included in the record (Idem—Item #8).

THE INJUNCTION CASE

Officially this case is styled *Donovan v. The Supreme Court of Texas*, No. CA-3-63-120 filed in the United States District Court, Northern District of Texas on April 23, 1963. The action was by certain of the Plaintiffs in the *Brown* case against the Supreme Court of Texas and the Court of Civil Appeals. The relief prayed for was an injunction against the State Courts' interference with Plain-

tiffs' prosecution of the *Brown* case in Federal Court. While the Federal Court dismissed the case as "moot" because of the prior dismissal of the *Brown* case, the record shows that the *Brown* case had been appealed and was not moot. (Testimony in Injunction case.)

CONCLUSION

The foregoing review of the various legal actions and proceedings establishes the following facts of record:

1. At the time the *Brown* case was filed in Federal Court, no litigation was pending in State Court, nor had any of the issues raised in the *Brown* case been litigated in any State Court proceeding.
2. The United States District Court, as of October 12, 1963 had jurisdiction over the subject matter and the persons of the Defendants in the *Brown* case.
3. The Court of Civil Appeals Judgment denying Respondents' Application for Writ of Prohibition was final and not subject to review by appeal (Mandamus Case Record—Item #9, Page 2).
4. The Supreme Court recognized that writs of prohibition issue to courts and not to litigants but disregarded the rule as "technical" (Idem).
5. The Supreme Court held that the *Atkinson* case Judgment was not a Judgment of the Supreme Court, and based its right to issue mandamus on Article 1733 Revised Civil Statutes of Texas, authorizing issue of "writs of mandamus agreeable to the principles of law regulating such writs" (Idem p. 3).

6. It held that when exercise of power is discretionary its exercise may not be compelled by a superior court (Idem p. 4).

7. The Supreme Court then reversed the finding of fact and law made by the Court of Civil Appeals in the Prohibition case and ordered that Court to set aside a Judgment made after trial, which Judgment involved the exercise of judicial discretion.

8. The Court of Civil Appeals reversed its Judgment without notice to the parties involved, and without notice entered a purported order carrying out the direction of the Supreme Court.

9. The Court of Civil Appeals wholly failed to issue or cause to be served legally any legal process to prohibit Petitioners from doing anything.

10. The United States District Court failed to protect its jurisdiction over the *Brown* case, and substituted State Court Judgments for the Judgment which it was required to render under the Constitution and Laws of the United States; it further wholly failed to apply the Rules of Federal Civil Procedure.

11. The United States District Court dismissed the Injunction case as Moot, when the *Brown* case was still pending.

12. The opinion written by the Court of Civil Appeals on June 7, 1963 was for the purpose of expressing the Court's personal venom against an Attorney, and not as the basis of its Judgment entered May 22, 1963.

13. The Court of Civil Appeals punished an Attorney and his clients for filing a suit in Federal Court against it and the Supreme Court of Texas, seeking to enjoin those Courts from interfering with Petitioners' prosecution of the *Brown* case, even though no order or alleged order of any Court prohibited such an injunction suit.

It has long been settled that State Courts may not enjoin proceedings in Federal Court once jurisdiction has attached. *U. S. Council of Keokuk*, 73 U. S. 514, 6 Wall 514, 18 L. Ed. 933; *Riggs v. Johnson County*, 6 Wall 166, 18 L. Ed. 768; *Weber v. Lee County*, 6 Wall 210, 18 L. Ed. 781; *United States v. Keokuk*, *supra*; *National Labor Relations Board v. Sunshine Mining Co.*, 125 Fed. 2d 757.

In *Canterbury v. Mandeville*, 63 S. Ct. 472, 318 U. S. 47, 87 L. Ed. 605 it is written: "But when the judgment sought is strictly in personam for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court which may be set up as *res adjudicata* in the other. These principles were recognized and the authorities sustaining them collected in *Penn General Casualty Company v. Pennsylvania*, 294 U. S. 189, 55 S. Ct. 386, 79 L. Ed. 850."

A Federal decision which closely parallels the State action here is that of *Supreme Tribe B-H v. Cauble*, 235 U. S. 356, 65 L. Ed. 673, 41 S. Ct. 338, where it was held that a federal district court, having rendered a decree in a class suit, brought in behalf of a certain class of beneficiaries in

a fraternal association, might enjoin members of the class, found to be bound by the decree, from prosecuting suits in the state courts which would relitigate questions settled by such decree. This decision was reversed by the Court in *Toucey v. N. Y. Life Insurance Co.*, 62 S. Ct. 139, 314 U. S. 118, 86 L. Ed. 100.

Petitioners submit that the action of the Supreme Court of Texas in issuing the Writ of Mandamus was unconstitutional and void because it constituted a usurpation of the power vested in the United States Courts by the third Article of the Constitution; the mandamus was issued by the Supreme Court in direct contravention of the Texas statute authorizing the issuance of the writ *agreeable* to principles of law; the Court violated the principle that such a writ will not issue to compel performance of a discretionary act, and here the Court ordered reversal of a judgment entered after hearing upon a decision split two to one; it not only reversed, without appellate jurisdiction, a judgment, but instructed the trial court as to the judgment to be entered; further it usurped the jurisdiction of the Federal Court to determine the validity of a plea of res adjudicata pleaded in the action before it; it also made findings of fact contrary to the record and the finding of the trial court in violation of the rule that such findings will not be made in determining the right of a Petitioner to Mandamus. The action of the Supreme Court of Texas in excess of its jurisdiction and in violation of the jurisdiction of the United States District Court was null and void; it constituted a deprivation of the rights guaranteed to Petitioners by the

United States Constitution, in the provisions heretofore cited.

Since the action of the Supreme Court of Texas was void; all subsequent action taken by the Court of Civil Appeals pursuant to the Mandamus would likewise be void; the Court of Civil Appeals further deteriorated the situation by failing to obey its own rules in setting aside a judgment without notice, acting under invalid legal process, not properly served, and entertaining the City Attorney's Application for punishment for contempt without requiring proof of his authority; it further acted unconstitutionally by adjudging the parties in contempt without requiring proof of the order they were alleged to have violated or proper service thereof as required by law. The punishment imposed was excessive in view of the fact that the parties punished were acting in good faith, believing that the alleged orders issued were invalid and void; since husbands and wives of the same family were separately fined and the punishment appeared to be vindictive in view of the fact that no proof was offered showing that the Complainant has sustained any damage.

The Federal District Court action in dismissing the suits was contrary to law and the Constitution; that Court had the obligation under Federal law to protect its jurisdiction and to render judgment in the cases involved upon the basis of the facts and law presented to that Court in the normal course of legal proceeding. The action of that Court in substituting the State Courts' judgments for its own constituted a denial to Petitioners of their rights to

prosecute their claims in Federal Court without interference from the State. The dismissal of the Appeal to the United States Court of Appeals, 5th Circuit upon request made by Petitioners under threat of fine and imprisonment constituted an invasion of the jurisdiction of the Circuit Court of Appeals and this Court. The District Court not only denied Petitioners their right to the Federal Forum, but by refusing to protect its jurisdiction set Petitioners up for punishment by fine and imprisonment.

The record clearly shows that Petitioners have to this day not had a day in Court on the issues raised in the *Brown* case. The discriminatory nature of the judicial action complained of is demonstrated by the alleged Writ of Prohibition which prohibits *only* the people living in the Love Field area from trying to enforce their rights in Federal Court. Under that alleged Order any one else in the City of Dallas is free to file the same complaint as was filed in the *Brown* case in Federal Court and prosecute the same to a conclusion. Obviously this action is discriminatory, a denial of due process, equal protection of the laws and equal privileges and immunities. Some of the Petitioners fined had never been involved in the *Atkinson* case, and since the issues in that and the *Brown* case were distinct and different the spurious "class" doctrine and theory of *res adjudicata* applied by the State Courts was inapplicable to them.

Wherefore Petitioners pray that this Application for Writ of Certiorari be granted and that upon review, this Court declare null and void all actions of the Supreme

Court of Texas in issuing the Writ of Mandamus complained of; that this Court declare all actions of the Court of Civil Appeals in reversing its Judgment denying Writ of prohibition, issuing an alleged Writ of Prohibition, and punishing Petitioners for Contempt null, void and of no effect; and further that this Court reverse the Judgments of the United States District Court dismissing the *Brown* case and the Appeal taken therefrom and dismissing the *Donovan* action against the Supreme Court; and Petitioners further pray that this Court order the Court of Civil Appeals 5th Supreme Judicial District of Texas to refund all fines collected from Petitioners and to enter an Order clearing Petitioners of all contempt.

Petitioners further pray that this Court enter an Order enjoining the State Courts of Texas from further interference with Petitioners' rights to prosecute the *Brown* case in Federal Court or any other case over which the Federal Court has jurisdiction of the subject matter and the parties.

Petitioners suggest that if the relief prayed for be not granted, that any United States citizen may henceforth be denied the federal forum for protection of his rights under the United States Constitution and Federal law, by the simple device of a State Court enjoining such citizen from seeking relief in Federal Court.

Respectfully submitted,

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SUPREME COURT OF TEXAS, MANDAMUS**CALVERT, Chief Justice.**

When irrelevant and immaterial matters are eliminated from this direct proceeding in this Court, only two ultimate questions remain for determination: 1. Has this Court jurisdiction to issue a writ of mandamus to a Court of Civil Appeals requiring it, in a proper case, to issue all writs necessary to prevent prosecution of a suit in which the plaintiffs, bound by a prior judgment of the Court of Civil Appeals, seek to relitigate issues which were determined by the prior judgment? 2. If so, does the record before us present a case in which our jurisdiction to issue the writ of mandamus should be exercised?

[1] The City of Dallas and its officials filed a proceeding in the Court of Civil Appeals for the Fifth Supreme Judicial District, sitting at Dallas, in which they sought the issuance of a writ of prohibition to prohibit the prosecution by the plaintiffs and their attorney of Civil Action No. 9276, styled Daniel C. Brown et al. v. City of Dallas, et al., pending on the docket of the United States District Court for the Northern District of Texas, Dallas Division, and to direct their dismissal of the case. The writ of prohibition was sought on the ground that the plaintiffs in Brown v. City of Dallas are attempting to relitigate issues determined by a final judgment of the Court of Civil Appeals for the Fifth District in Atkinson et al. v. City of Dallas et al., 353 S. W. 2d 275, writ refused, no reversible error. The Court of Civil Appeals denied the relief sought 362 S. W. 2d 372. The court's judg-

ment is not reviewable by appeal or writ of error. *City of Houston v. City of Palestine*, 114 Tex. 306, 267 S. W. 663.

The City of Dallas and its officials now seek a writ of mandamus from this Court directing the Court of Civil Appeals for the Fifth District, and the individual Justices of that court, to issue a writ of prohibition as there prayed for.

Before discussing the two questions posed at the beginning of this opinion, we dispose of two matters which we regard as irrelevant and immaterial.

[2] Respondents urge that relators are not entitled to relief from the Court of Civil Appeals because they seek relief only against the plaintiffs and their attorney in *Brown v. City of Dallas* and ask only for a writ of prohibition; that writs of prohibition issue to courts and not to litigants. Technically speaking, that is correct, *City of Houston v. City of Palestine*, 114 Tex. 306, 267 S. W. 663; *Lowe and Archer, Injunctions and Other Extraordinary Remedies*, p. 482, § 511; *High, a Treatise on Extraordinary Legal Remedies*, pp. 603-604, § 762; 42 Am. Jur. 139-140, 150-151, *Prohibition*, §§ 2, 3, 11, although the true function of the writ is often overlooked. See *Humble Oil & Refining Co. v. Fisher*, 152 Tex. 29, 253 S. W. 2d 656. However, incorrect identity of the writ sought is of no significance. Relators seek from the Court of Civil Appeals a writ directing the plaintiffs and their attorney to desist from further prosecution of *Brown v. City of Dallas* in the United States District Court. If they are entitled to that relief, necessary and proper writs, by whatever names they may be called, should be issued.

[3] Relators suggest in their brief that inasmuch as this Court refused writ of error, no reversible error, in Atkinson v. City of Dallas, the judgment of the Court of Civil Appeals in that case is a judgment of this Court which this Court may enforce by issuing writs to the plaintiffs and their attorney in Brown v. City of Dallas. The judgment of the Court of Civil Appeals in Atkinson v. City of Dallas is not a judgment of this Court. A judgment of a Court of Civil Appeals becomes a judgment of this Court when writ of error is granted for review of the judgment and it is affirmed. Houston Oil Co. of Texas v. Village Mills Co., 123 Tex. 253, 71 S. W. 2d 1087. But when writ of error for review of a Court of Civil Appeals' judgment is "Refused" or "Refused, No Reversible Error," this Court simply refuses to grant writ of error for the purpose of reviewing the judgment. City of Palestine v. City of Houston, Tex. Civ. App., 262 S. W. 215, 220, writ dismissed, 114 Tex. 396, 267 S. W. 663.

We now consider whether this Court has jurisdiction to issue a writ of mandamus to a Court of Civil Appeals requiring it, in a proper case, to issue all writs necessary to prevent prosecution of a suit in which the plaintiffs, bound by a prior judgment of the Court of Civil Appeals, seek to relitigate issues which were determined by the prior judgment.

[4] It is clear that the Supreme Court has jurisdiction to issue a writ of mandamus to a Court of Civil Appeals to compel it to perform a mandatory duty. Simpson v. McDonald, 142 Tex. 444, 179 S. W. 2d 239. Jurisdiction is con-

federal by Article 1733¹ which authorizes the Supreme Court in original proceedings to issue "writs of * * * mandamus agreeable to the principles of law regulating such writs, against any district judge, or Court of Civil Appeals or judges thereof, * * *." Legislative authority for enactment of the statute is found in Sec. 3, Art. V of the Constitution, Vernon's Ann. St.

[5] Sec. 6, Art. V of the Constitution confers jurisdiction in particular matters on the Courts of Civil Appeals, and provides: "Said Courts shall have such other jurisdiction, original and appellate as may be prescribed by law." By the enactment of Art. 1823 the Legislature has provided: "Said courts [Courts of Civil Appeals] and the judges thereof may issue writs of mandamus and all other writs necessary to enforce the jurisdiction of said courts." Interference with enforcement of a court's judgment is interference with its jurisdiction, and the quoted constitutional and statutory provisions confer jurisdiction on Courts of Civil Appeals to issue whatever writs are necessary, including the writ of injunction, to enforce their judgments. *Long v. Martin*, 116 Tex. 135, 287 S. W. 494; *Cattlemen's Trust Co. of Fort Worth v. Willis*, Tex. Civ. App., 179 S. W. 1115; *Nash v. Hanover Fire Ins. Co.*, Tex. Civ. App., 79 S. W. 2d 182. But recognition that such jurisdiction exists does not furnish a complete answer to our problem.

[6, 7] Conferral of jurisdiction on a court to do a given act invests it with power to do the act, *Morrow v. Corbin*,

¹All Article references are to Vernon's Annotated Texas Civil Statutes.

122 Tex. 553, 62 S. W. 2d 641; but whether the act is to be done may be either discretionary or mandatory. When exercise of the power is discretionary, its exercise may not be compelled by a superior court. When exercise of the power is mandatory, it may and should be compelled. It follows that whether this Court may and should issue a writ of mandamus to a Court of Civil Appeals to compel it to enforce one of its judgments must turn on whether enforcement of the judgment is merely a discretionary right or is a mandatory duty of the court.

Generally speaking, enforcement of a judgment by the court which renders it, trial or appellate, is a duty. If a judgment is not enforced, the successful litigant has accomplished nothing; he has his victory but is denied its fruits. Judgments are rendered for the purpose of settling disputes between the parties to it; they are not to be nullified by either passive nonobservance or active interference. This does not mean, however, that it is the duty of an appellate court to exercise its original jurisdiction to enforce its judgments in every case. When an adequate remedy is otherwise available to a holder of rights under an appellate court judgment, the court which rendered it may, in its discretion, decline to exercise its original jurisdiction.

[8] One in whose favor an appellate court judgment has been rendered has an adequate remedy to bar a second suit which seeks only to relitigate the issues between the parties, or their privies, and which does not otherwise interfere with enforcement of the prior judgment or with the rights of the

parties springing from it. The remedy lies in the trial court in the defensive plea of res judicata; and the fact that the holder of rights under the prior judgment may be put to some trouble, delay and expense in defending the second suit does not render his remedy so inadequate as to require intervention by the appellate court through exercise of its original jurisdiction to enforce its judgment in the first suit. Milam County Oil Mill Co. v. Bass, 106 Tex. 260, 163 S. W. 577; Brazos River Conservation and Reclamation Dist. v. Belcher, 139 Tex. 368, 163 S. W. 2d 183; Iley v. Hughes, 158 Tex. 362, 311 S. W. 2d 648, 85 A. L. R. 2d 1. If the rule were otherwise, the defense of res judicata to suits in trial courts would soon be abandoned in all instances involving appellate court judgments in favor of original proceedings in our appellate courts. The Supreme Court and Courts of Civil Appeals are primarily courts of review, and there is nothing in the constitutional and statutory provisions, or in our decisions, requiring them to exercise original jurisdiction to enforce their judgments when the same relief may be obtained relatively as expeditiously and inexpensively in the trial courts.

[9]. We should recognize, however, that a plea of res judicata as a defense to a second suit is not an adequate remedy for one holding rights under an appellate court judgment when an actual interference with enforcement of the judgment is coupled with the second suit, or when the mere filing and prosecution of the suit destroys the efficacy of the judgment. In such instances we conceive it to be the

duty, as well as the right, of the appellate court to exercise its original jurisdiction to enforce its judgment.

The Supreme Court and the various Courts of Civil Appeals have been prompt to discharge their duty to prohibit the prosecution of suits in which actual interference with enforcement of their judgments has been accomplished through ancillary writs issued by trial courts. Crouch v. McGaw, 134 Tex. 633, 138 S. W. 2d 94; Cattlemens Trust Co. of Fort Worth v. Willis, Tex. Civ. App., 179 S. W. 1115; Nash v. McCallum, Tex. Civ. App., 74 S. W. 2d 1046; Brownинг-Ferris Machinery Co. v. Thompson, Tex. Civ. App., 55 S. W. 2d 168; Life Ins. Co. of Virginia v. Sanders, Tex. Civ. App., 62 S. W. 2d 348. They have also been prompt to discharge their duty to prohibit the prosecution of suits which cloud title to real property when title has been settled by their prior judgments. Houston Oil Co. of Texas v. Village Mills Co., 123 Tex. 253, 71 S. W. 2d 1087; Rio Bravo Oil Co. v. Hebert, 130 Tex. 1, 106 S. W. 2d 242; Continental State Bank of Big Sandy v. Floyd, 131 Tex. 388, 114 S. W. 2d 530; Humble Oil & Refining Co. v. Fisher, 152 Tex. 29, 253 S. W. 2d 656; Yount-Lee Oil Co. v. Federal Crude Oil Co., Tex. Civ. App., 92 S. W. 2d 493. It is obvious that in the latter type of case the mere filing and prosecution of the suit destroys the efficacy of the prior judgment.

There are instances in which the Supreme Court and the Courts of Civil Appeals have exercised their original jurisdiction to enforce their judgments by prohibiting the prosecution of second suits involving the same parties and issues

when they were under no duty to do so. In most of such instances there was a taint of flagrant disregard of the appellate court judgment or an element of harassment and vexatious litigation. See *Hovey v. Shepherd*, 105 Tex. 237, 147 S. W. 224; *Conley v. Anderson*, Tex., 164 S. W. 985; *Sparenberg v. Lattimore*, 184 Tex. 671, 139 S. W. 2d 77; *Nash v. Hanover Fire Ins. Co.*, Tex. Civ. App., 79 S. W. 2d 182; *Haskell National Bank of Haskell v. Ferguson*, Tex. Civ. App., 155 S. W. 2d 427; *National Surety Corp. v. Jones*, Tex. Civ. App., 158 S. W. 2d 112; *Ferguson v. Ferguson*, Tex. Civ. App., 189 S. W. 2d 442; *City and County of Dallas v. Cramer*, Tex. Civ. App., 207 S. W. 2d 918. In some reported instances there has been a declination to exercise jurisdiction to enforce prior judgments by prohibiting the prosecution of second suits when there was no duty to do so. *Milam County Oil Mill Co. v. Bass*, 106 Tex. 260, 163 S. W. 577; *Brazos River Conservation and Reclamation Dist. v. Belcher*, 139 Tex. 368, 163 S. W. 2d 183. Declination is not usually reflected in a reported opinion; it is evidenced by an order denying permission to file an application for extraordinary writs.

We have written at some length on the first question in an effort to harmonize prior decisions and to delineate for bench and bar the situations in this area in which the issuance of extraordinary writs by appellate courts to enforce their judgments is discretionary and those in which issuance of such writs is a duty. We recognize that what we have said and held is, to some extent, in conflict with statements in other opinions. In *Milam County Oil Mill Co. v. Bass*, 106 Tex. 260,

163 S. W. 577, 578, we said that this Court was *without jurisdiction* to issue extraordinary writs to enforce its judgment when the only purpose of the writs was to prevent the prosecution of a suit "which makes no attempt to obstruct its [the judgment's] execution, but denies its conclusiveness upon what is alleged to be another cause of action." In Houston Oil Co. v. Village Mills Co., 123 Tex. 253, 71 S. W. 2d 1087, 1089, although attempting to distinguish Bass, we said that this Court had jurisdiction to issue such writs as were necessary to enforce its judgment by prohibiting the prosecution of a second suit between the same parties or their privies, if the second suit "directly involves the relitigation of rights established by the judgment, and is of such a nature that, if successfully prosecuted, will result in a judgment which will purport the divesting of those rights." In neither case did we deal with the problem discussed here, that is, whether the exercise of jurisdiction, once conceded, is discretionary or mandatory.

[10] It is difficult to conceive of a case between the same parties and directly involving relitigation of rights established by a judgment, which, if successfully prosecuted, would *not* result in a judgment purporting the divesting of those rights. Even a take-nothing judgment in a personal injury damage suit would establish the right of the defendant not to pay; and a suit by the plaintiff to relitigate the issues, if successful, would result in a judgment divesting that right. We consider Village Mills and other cases, cited above, subsequent in point of time to Bass, to establish jurisdiction of this Court and the Courts of Civil Appeals to issue all writs

necessary to prevent prosecution of a suit in which the plaintiffs, bound by a prior judgment of the court, seek to relitigate issues which were determined by the prior judgment. And we hold, further, that exercise of such jurisdiction is mandatory when an actual interference with enforcement of the judgment is coupled with the second suit or when the mere prosecution of the suit destroys the efficacy of the judgment.

Under the rule here announced, if *Brown v. City of Dallas*, now pending in the United States District Court, is, as relators allege, an effort by parties bound by the judgment in *Atkinson v. City of Dallas* to relitigate the issues finally determined by the Court of Civil Appeals in that case, it is the duty of the Court of Civil Appeals to enjoin further prosecution of *Brown v. City of Dallas*. At issue is the validity of certain revenue bonds, known as Love Field Revenue Bonds, sought to be issued and sold by the City of Dallas, and the use of funds derived from the sale for improvement of airport runways at Love Field. If the judgment of the Court of Civil Appeals in *Atkinson v. City of Dallas* finally adjudicated the validity of the bonds and the right of the City of Dallas to expend funds derived therefrom for improvements at Love Field, the mere prosecution of any subsequent suit attacking the validity of the bonds and the right so to expend their proceeds destroys the efficacy of that judgment. Under the provisions of Section 3, Article 1269j-5, the authorizing statute, revenue bonds of this type cannot be finally issued until approved by the Attorney General, and the Attorney General does not approve issuance as long as

their validity is under attack in pending litigation. The mere filing and prosecution of the Brown suit is as effective to prevent enjoyment of the rights fixed by the prior Atkinson judgment as an injunction to prevent sale of the bonds would be.

The Court of Civil Appeals denied the relief sought by relators on the ground that it had no jurisdiction to grant it. Therefore, that court did not reach the question of whether the plaintiffs in Brown v. City of Dallas were bound by the Atkinson judgment and were seeking to relitigate issues foreclosed by that judgment. We are convinced by an examination of the pleadings in the two cases that they are.

Forty-three persons joined as plaintiffs in filing and prosecuting Atkinson v. City of Dallas. The suit was filed as a class action. The plaintiffs alleged that they were resident taxpayers of the City and County of Dallas and owners of homes and real property therein. They stated that included in the class which they represented were "the home owners, families and individuals who live, work, reside and attend schools, churches and other community centers in the area embraced within the approach areas of the planned runway," and that the persons constituting the class they represented numbered in the thousands making it impracticable to bring them before the Court. The plaintiffs sought a permanent injunction against issuance of the Love Field Revenue Bonds and against the building of an extended runway at Love Field.

The petition in Atkinson tendered many reasons why the injunction sought should issue. We will not review them in detail. Generally, it was alleged that all state statutes which purported to authorize issuance of the bonds were unconstitutional and void; that the bonds themselves were void because (1) not authorized by vote of the qualified voters, (2) they created a debt of the City of Dallas without compliance with constitutional requirements and in excess of that allowed by the charter of the City of Dallas, and (3) they constituted a lending of credit to individuals and corporations without the two-thirds vote of taxpayers required by Sec. 52, Art. III of the Constitution. Generally, it was alleged that the building of the runway violated Amendments V and XIV of the Constitution of the United States and Sec. 17, Art. I of the Constitution of Texas in that it would constitute a taking of their air-space without due process of law and denied them equal protection of the laws; that the proposed runway did not comply with Federal regulations as required by state statute; that the noise, smoke and danger from low-flying planes using the runway would disturb the quiet enjoyment of their properties and institutions, diminish the value of their properties and endanger their lives and health; that the establishment and use of the runway would create a public nuisance, and that the action of the City in constructing the runway was ultra vires and arbitrary.

[11] All of these issues and all subsidiary issues raised by the pleadings but not here mentioned, as well as all issues which by diligence could have been raised and tried, were determined and foreclosed against the plaintiffs by the judg-

ment of the Court of Civil Appeals affirming summary judgment against them in Atkinson v. City of Dallas, Freeman v. McAninch, 87 Tex. 132, 27 S. W. 97, 47 Am. St. Rep. 79; Ogletree v. Crates, Tex., 363 S. W. 2d 431. The fact that this Court refused writ of error, "No Reversible Error," in Atkinson does not indicate otherwise. It is the judgment of the Court of Civil Appeals, not its opinion, which brings the rule of res judicata into play. The notation, "Writ Refused. No Reversible Error," casts not the slightest cloud on a judgment of a Court of Civil Appeals. Rule 483, Texas Rules of Civil Procedure.

Respondents assert that the judgment in Atkinson is not res judicata of the issues in Brown because neither the parties nor the issues are the same.

[12] Brown v. City of Dallas was filed by one hundred twenty-two persons, thirty of whom were plaintiffs in the Atkinson case. Others than the City of Dallas were made defendants, i. e., City officials, the Attorney General of Texas, certain securities dealers and their attorneys, and certain owners of bonds already sold. The suit does not purport to be a class action, but the plaintiffs are all described as "taxpayers of the City of Dallas, Texas, and the owners of homes situated within the approach areas of existing and proposed runways at Love Field."

[13] It is immaterial that Brown is not a class action. The controlling fact is that Atkinson was a class action as authorized by Rule 42, Texas Rules of Civil Procedure; and being a class action of a hybrid type, the judgment in Atkin-

son binds all members of the class insofar as validity of the bonds and the right of the City to construct the runways are concerned if the class was adequately represented by those who sued on behalf of the class. McDonald, Texas Civil Practice, Vol. 1, § 3.37, pp. 283-284; Hovey v. Shepherd, 105 Tex. 237, 147 S. W. 224. The description of the plaintiffs in Brown, quoted above, shows clearly that they are members of the class represented by the plaintiffs in Atkinson, and it is not suggested that they were not adequately represented in that suit. Their right to relitigate the same issues is foreclosed by our decision in Hovey v. Shepherd, *supra*. This must be so. If it were not so, different groups of Dallas citizens could halt all efforts of the City to improve its airport facilities indefinitely by filing new suits. Such an absurdity cannot be tolerated.

An analysis of the petition in Brown discloses that the issues sought to be litigated are essentially the same as the issues litigated in Atkinson, and the prayer is for the same ultimate relief. Such additional collateral issues as are injected in Brown could, by diligence, have been litigated in Atkinson. They are, therefore, also foreclosed by the judgment in Atkinson.

[14] We conclude that it is the duty of the Court of Civil Appeals for the Fifth Supreme Judicial District to enforce its judgment in Atkinson v. City of Dallas by issuing whatever writs are necessary and effective to restrain the plaintiffs and their attorney in Brown v. City of Dallas from further prosecution of that suit. That action will no more invade or trench upon the jurisdiction of the United States

District Court than did the injunction issued in University of Texas v. Morris, 162 Tex. 60, 344 S. W. 2d 426. See also: Moton v. Hull, 77 Tex. 80, 13 S. W. 849, 8 L. R. A. 722; 28 Am. Jur. 737, Injunctions, § 229. The Court of Civil Appeals may not, however, order or direct dismissal of Brown v. City of Dallas. A suit cannot be dismissed from the docket of a court without an order of the court; and any writ directing dismissal of Brown v. City of Dallas would invade the jurisdiction of the United States District Court to control its own docket.

There is indication in the history of this matter that it has reached the point of vexatious and harassing litigation. If the Court of Civil Appeals concludes that other suits to relitigate the same issues may be filed by other members of the class bound by the judgment in Atkinson, that court may, upon proper allegations and prayer, enjoin the filing of such suits by other members of the class.

We are satisfied that the Court of Civil Appeals will honor this opinion and will grant all necessary and proper writs for the enforcement of its judgment in Atkinson v. City of Dallas. Writ of mandamus will issue only if it should fail or refuse to do so.

COURT OF CIVIL APPEALS, PROHIBITION**DIXON, Chief Justice.**

City of Dallas, together with certain of its officials and and other interested parties, Petitioners, seeks a writ of prohibition and ancillary orders against James P. Donovan and about 200 of his clients, Respondents, to prohibit Respondents from further prosecuting Civil Action No. 9276, styled Brown, et al. v. City of Dallas et al., now pending in the United States District Court for the Northern District of Texas, Dallas Division.

Petitioners allege that the issues which Respondents present in their suit in the United States District Court are the same issues involving the same subject matter that have been previously adjudicated by this Court in the case of Atkinson et al. v. City of Dallas, Tex. Civ. App., 353 S. W. 2d 275; and that the writ of prohibition is necessary to protect the previous judgment of this Court and its enforcement and execution.

The record discloses events leading up to or connected with Petitioners' application as follows:

1. On April 3, 1961 George S. Atkinson and others, owners of property near Love Field, a municipal airport located in the City of Dallas filed a class suit in the District Court of the State of Texas to restrain the City of Dallas from the construction of a runway at the airport. The suit also attacked the validity of certain revenue bonds which the City was about to issue to finance construction of the runway.

2. On July 17, 1961 a summary judgment was rendered in favor of the City denying the permanent injunction sought by the Plaintiffs.

3. On December 15, 1961 this Court on the appeal of the case, affirmed the above summary judgment. Motion for rehearing was overruled on January 19, 1962. A detailed statement of the points urged on the appeal will be found in 353 S. W. 2d 275.

4. On March 14, 1962 the Supreme Court of Texas denied a writ of error in the case with the notation "no reversible error", and announced that a motion for rehearing would not be entertained.

5. On June 25, 1962 the Supreme Court of the United States denied a writ of certiorari in the case, Atkinson v. City of Dallas, 370 U. S. 939, 82 S. Ct. 1587, 8 L. Ed. 2d 808, and on October 8, 1962, 83 S. Ct. 18 overruled a motion for rehearing. Thus the judgment of this Court of December 15, 1961 affirming the summary judgment of the trial court became final for all purposes, and the issues decided in our judgment of affirmance became res judicata.

6. On September 24, 1962 Respondents herein filed Civil Action No. 9276, styled Brown et al. v. City of Dallas et al., in the United States District Court. By this suit they seek a permanent injunction against the City, to restrain the City from building the runway and from issuing certain revenue bonds. They do not seek a temporary injunction, and none has been granted. Thirty of the plaintiffs in the United

States District Court are the same persons who were plaintiff in the original suit filed April 3, 1961 in a District Court of Dallas County. Other plaintiffs, all alleged to be property owners, were added in the United States District Court.

7. On October 2, 1962 the City of Dallas filed the application for writ of prohibition which is now before us for decision. The City asserts that the suit in the United States District Court is merely an attempt to relitigate the issues which were adjudicated in our judgment of affirmance of December 15, 1961.

8. On October 6, 1962 Respondents filed an application in the United States District Court seeking to enjoin this Court from further considering or acting on the City's application for a writ of prohibition.

9. On October 10, 1962, the United States District Court dismissed Respondents' application for injunction to restrain this Court from further considering the City's application for a writ of prohibition.

Are the issues raised in the Civil Action No. 9276, styled Brown et al. v. City of Dallas et al. filed September 24, 1962 in the United States District Court the same as the issues adjudicated in our judgment of affirmance of December 15, 1961, which judgment became final when the Supreme Court of the United States on October 8, 1962 overruled a motion for rehearing? Petitioners contend that the issues are the same. Respondents contend that they are not the same.

After a careful consideration of the whole record a majority of our Court have concluded that it is not necessary for us to answer the above question in order to decide whether to grant or refuse the writ of prohibition sought by Petitioners. For it is our opinion that regardless of whether the issues are the same, there are other considerations which should and do cause us to decide that the writ ought to be refused.

[1, 2] Under Art. 1823, Vernon's Ann. Civ. St. we are given authority to issue writs of mandamus and other writs only when necessary to protect our jurisdiction. State Farm Mutual Automobile Ins. Co. v. Worley, Tex. Civ. App., 346 S. W. 2d 407, 409. The pendency of Action No. 9276 in the United States District Court does not invade our exclusive jurisdiction, though the issues in the suit may be the same as the issues decided in our judgment of affirmance. Ours is not the only Court which has jurisdiction to enforce a plea of res judicata in support of our judgment of affirmance of December 15, 1961. That defense may be and has been pled by the City in Action 9276 in the United States District Court, and that Court has jurisdiction to hear and give effect to the plea.

Petitioners contend in effect our jurisdiction is invaded because Respondents have filed a suit in another Court in which Respondents try to ignore the finality of our judgment. And Petitioners further contend that the only way our jurisdiction can be protected and respected is by the issuance of a writ of prohibition restraining the litigants from

further prosecuting their suit in the other Court where it is now pending. We do not agree to such contention. To agree would be equivalent to hold that the conclusiveness of a judgment could never be determined except by the Court that rendered it.

In a situation similar in most respects to the situation now before us our Supreme Court took note of the difference between an invasion of a court's jurisdiction and the mere filing of a suit in disregard of a prior judgment. We quote from the opinion by Justice Nelson Phillips in Milam County Oil Mill Co. v. Bass, 106 Tex. 260, 163 S. W. 577:

"* * * to disregard a judgment through the institution of a suit is not necessarily to obstruct its operation. True it may draw the judgment into question through the denial of its effect, and the judgment may be so conclusive as to render the suit a groundless one; but the jurisdiction of the court is not invaded by the mere assertion of rights through such method, even in contravention of the judgment, so long as its operation is left unimpeded. If a court should entertain such a suit, and through want of jurisdiction or failure to accord to the judgment its legal effect render an erroneous decree, the remedy provided by our system for its revision and the readjudication, if needs be, of the conclusiveness of the judgment, is an appeal. (emphasis ours)

"We are not insensible to the hardship that such cases may sometimes impose, nor to the forcible argument of the able counsel for relators that litigation in relation to this estate, so prolonged as its history discloses, should end; but such considerations afford in themselves no ground for the closing of the doors of the courts to suits, however ill founded, brought in evident good faith. * * *

"The power of a court to enforce its jurisdiction does not include an authority to prevent the prosecution of any suit to which a judgment of the court may be an effectual bar, but which, beyond presenting an issue as to the conclusiveness of the judgment upon the asserted cause of action, makes no attempt to disturb it, or to interfere with its execution or the exercise of rights established by it, as such a suit does not conflict with the exercise of that power which constitutes jurisdiction in the court, the power to hear and determine the cause and enforce the judgment rendered, and therefore does not violate its jurisdiction. The assumption of such right would invest a court not merely with the control of its own judgments and authority to enforce its jurisdiction, but with a further power to govern other courts in the exercise of their lawful jurisdiction; and the result would be that the issue of the conclusiveness of a judgment upon what is urged as a distinct cause of action could never be determined except by the court that rendered it." (emphasis ours)

The Supreme Court went on to say that the cases of Hovey v. Shepherd, 105 Tex. 237, 147 S. W. 224, and Conley v. Anderson, 106 Tex. 265, 164 S. W. 985 are not in opposition to the above expressed view. In both of them the suits which were prohibited, directly attempted to obstruct the execution of the judgments of the Supreme Court. In our opinion the same thing may be said of Cattlemen's Trust Co. of Ft. Worth v. Willis, Tex. Civ. App., 179 S. W. 1115.

In the instant case the United States District Court has done nothing to repudiate our judgment of affirmance; and we shall not assume that it will do any such thing. To the contrary we must assume that the United States District Court will give full effect to our judgment by sustaining a

plea of res judicata if the issues before it should prove to be the same issues which we previously adjudicated. State Farm Mutual Automobile Ins. Co. v. Worley, Tex. Civ. App., 346 S. W. 2d 407, 409.

In the above case it was further held that a writ of prohibition will not be granted where there is an adequate remedy at law, such as an appeal. This holding was in keeping with the holding of our Supreme Court in Milam County Oil Mill Co. v. Bass, *supra*, wherein it was held, that "if a court should entertain such a suit, and * * * render an erroneous decree, the remedy * * * is an appeal." See also Clark v. Ewing, Tex. Civ. App., 196 S. W. 2d 53, 55.

[3] Petitioners in the instant case allege that to pursue this cause in the United States District Court would involve hardships due to delay incident to a probable appeal by Respondents to the Circuit Court of Appeals and thereafter an attempt to obtain a writ of certiorari from the Supreme Court of the United States. While such proceedings are pending, delivery of the revenue bonds will be held up, for bond buyers will not purchase bonds while legal proceedings involving the bonds are pending. This may be true, but as stated in the Milam County case, consideration of hardships do not afford grounds for the closing of the doors to suits, however ill founded, brought in good faith.

It is with regret that the majority of our court feel impelled under the circumstances to decline to order the writ of prohibition to issue. But our duty as we see it is to refuse Petitioners' application.

Petitioners' application for a writ of prohibition is refused.

YOUNG, J., dissents.

YOUNG, Justice (dissenting).

In my opinion, the writ of prohibition, pursuant to Art. 1823, V.A.C.S., should issue on the City's plea of res judicata —the validity of Love Field Revenue Bonds having already been established in the Atkinson suit by final judgment of this Court and confirmed both by the Supreme Court of Texas and the United States Supreme Court. "The doctrine of 'res adjudicata', or estoppel by reason of a former judgment, rests upon the principle that a cause of action which has been once determined upon its merits by a competent tribunal, between parties over whom that tribunal had jurisdiction, cannot afterwards be litigated by them in another proceeding, either in the same or different tribunal. * * *."

24 Words and Phrases, Perm. Ed., "Res Adjudicata", p. 146.

Of these Revenue Bonds, Series No. 395 in amount of Eight Million Dollars were involved in the Atkinson case which could not be sold and delivered by reason of the litigation. On final adjudication of the Atkinson case as recited in the majority opinion, the City then continued a financing of the construction of the Love Field Runway by issuance of the same General Revenue Bonds, Series No. 401, but in the lesser amount of Five Million Dollars, to be sold September 24, 1962, on which date the Respondents filed another Civil Action in Federal Court, No. 9276, styled Daniel C. Brown et al. v. City of Dallas et al., again seeking permanent

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injunction against the sale of these bonds. No temporary injunction was sought and none was necessary, for, due to the unique nature of bonds and bond issues the mere filing of suit in Federal Court would have that effect.

Courts of Civil Appeals may protect its jurisdiction by writ of prohibition or injunction against maintenance by defendants to the judgment of a suit in another tribunal *attacking the validity of the original judgment or seeking to enjoin its execution*. See *Long v. Martin*, 116 Tex. 135, 287 S. W. 494. Does Respondents' suit in the Federal Court have this emphasized effect? It undoubtedly does.

Our Supreme Court of course, recognizes the doctrine of *res adjudicata* and has permitted this prohibitory writ to issue in all instances where the operation of the prior judgment or its execution has been directly interfered with, but not so (as in *City and County of Dallas v. Cramer, Judge*, Tex. Civ. App., 207 S. W. 2d 918) where "Relator would be left undisturbed, except by the annoyance of the suit, in the full enjoyment of the rights secured by the judgment of this court." Obviously the case of *Milam County Oil Mill Co. v. Bass*, 106 Tex. 260, 163 S. W. 577, was of the latter class; the Supreme Court stating that the cause of action, there asserted "makes no attempt to disturb it (the prior judgment) or to interfere with its execution or the exercise of rights established by it."

Judge Phillips further states in *Milam County Oil Mill Co. v. Bass*, supra, that: "The power to enforce its judgments necessarily inheres in a court as an essential attribute of its

jurisdiction, but there is a manifest difference between the enforcement of a judgment and the prevention of a suit which makes no attempt to obstruct its execution, but denies its conclusiveness upon what is alleged to be another cause of action. * * * The jurisdiction of the court is not invaded by the mere assertion of rights through such method, even in contravention of the judgment, so long as its operation is left unimpeded. * * *. (emphasis mine) And in Houston Oil Mill Co. of Texas et al. v. Village Mills Co. et al., 123 Tex. 253, 71 S. W. 2d 1087 the Supreme Court, referring to Milam County Oil Mill Co. v. Bass, *supra*, stated: "In that case it is by no means clear that the judgment sought in the Hill County suit, the second suit, would directly interfere with the operation of the prior judgment of this court."

The majority does not and cannot say that this second suit of Brown et al. v. City of Dallas et al., is not a renewal of the litigation foreclosed in the Atkinson case, the mere filing of which constitutes such a cloud upon the title to these general Revenue Bond issues as to preclude their sale. In the situation thus presented, the majority merely begs the question by their negative ruling on the application for writ of prohibition; concluding as they do that a plea of res adjudicata can as well be sustained by the Federal District Court, and such indeed may be the ruling of Judge Sarah T. Hughes. Even so, the door will be opened for full scale relitigation of the validity of these bonds in another trial court, on through the United States Circuit Court of Appeals and again to the Supreme Court of the United States. On the

other hand a grant of the relief prayed for by the City of Dallas will finally terminate this prolonged litigation, save for a possible appeal to the Supreme Court of Texas.

The legal maxim of "justice delayed is justice denied" is truly relevant to the adjudicated rights of Petitioner City of Dallas.

**COURT OF CIVIL APPEALS, CONTEMPT
OPINION OF COURT OF CIVIL APPEALS**

No. 16,193

CITY OF DALLAS, et al.,

Petitioners,

v.

DANIEL C. BROWN, et al.,

and

JAMES P. DONOVAN, Atty.,

Respondents.

Original contempt proceedings. The City of Dallas, acting through its City Attorney, by motion duly verified, moves this Court to declare respondents to be in contempt of this Court for violation of a Writ of Prohibition and Ancillary Orders issued by this Court on April 16, 1963. For a proper understanding of the issues here presented it is both desirable and essential to relate the following relevant antecedent facts.

1. On April 3rd, 1961 George S. Atkinson, and others, owners of property near Love Field, a municipal airport located in the City of Dallas, filed a class suit in the District Court of Dallas County seeking to restrain the City of Dallas from the construction of a runway at said airport. Said suit being No. 59027-H, styled GEORGE S. ATKINSON, ET AL V. CITY OF DALLAS, also attacked the validity of certain revenue bonds which the City of Dallas was about to issue to finance construction of the airport runway.

2. On July 17, 1961 the District Court granted a summary judgment in favor of the City denying permanent injunction sought by plaintiffs.

3. On December 15, 1961 this Court, on the appeal of the above case, affirmed the judgment of the trial court. Motion for rehearing was overruled on January 19, 1962. A detailed statement of the facts and issues involved will be found in this Court's opinion, being numbered 16,038, styled GEORGE S. ATKINSON, ET AL, V. CITY OF DALLAS, and reported in 353 SW 2d 275.

4. Appellants made application to the Supreme Court of Texas for a writ of error and, on March 14, 1962, the application was denied by the Supreme Court with the notation "No Reversible Error".

5. On June 25, 1962 the Supreme Court of the United States denied a writ of certiorari in the case, and on October 8, 1962 overruled a motion for rehearing. See GEORGE S. ATKINSON V. CITY OF DALLAS, 8 L. Ed. 2d 808, rehearing denied 9 L. Ed. 2d 92. By the action of the Supreme Court of the United States the judgment of this Court of December 15, 1961 became final.

On September 24, 1962 Respondents herein filed Civil Action No. 9276, styled BROWN, ET AL V. CITY OF DALLAS, ET AL in the United States District Court for the Northern District of Texas, Dallas Division. By this suit they sought a permanent injunction against the City of Dallas to restrain said City from building the runway and from issuing certain revenue bonds. No temporary in-

junction was sought, and none was granted. Forty of the plaintiffs in the case of Brown et al v. City of Dallas, et al in the United States District Court were the same persons who were plaintiffs in the original suit filed April 3, 1961 in the District Court of Dallas County, Texas and other plaintiffs, all alleged to be property owners, were added in the Federal Court case.

7. On October 2, 1962, the City of Dallas and others filed an application for Writ of Prohibition and other Ancillary Mandatory Orders in this Court asking us to enforce our judgment in ATKINSON V. CITY OF DALLAS by prohibiting the plaintiffs in the case of BROWN V. CITY OF DALLAS, ET AL in the United States District Court from attempting to relitigate the same issues and from interfering with the issuance and sale of the Love Field Revenue Bonds which this Court had declared to be valid in the ATKINSON decision. This Court was also requested to direct that the plaintiffs in the BROWN suit be required to dismiss said cause and refrain from filing any other litigation in reference to said runway and Love Field Revenue Bonds.

8. On October 6, 1962, the plaintiffs in the BROWN suit filed an application in the United States District Court seeking to enjoin this Court from considering or acting upon the City's application for writ of prohibition.

9. On October 10, 1962, at the hearing, the United States Court dismissed the application for injunction to restrain this Court from further considering the City's application for a writ of prohibition.

10. On October 24, 1962, by a divided court, with Chief Justice Dixon and Associate Justice Williams filing a majority opinion, we denied the City of Dallas the relief sought in its application for writ of prohibition. Associate Justice Young filed a written dissenting opinion. The motion for rehearing filed by the City of Dallas was overruled on November 23, 1962. City of Dallas, et al. v. Brown, et al. 362 SW 2d 372.

11. On December 8th, 1962, the City of Dallas, as petitioner, filed its original application for a mandamus in the Supreme Court of the State of Texas, in which it was asked that the Supreme Court order and direct this Court of Civil Appeals to grant the relief prayed for and which relief this Court had denied in Cause No. 16,193, styled CITY OF DALLAS, ET AL. V. DANIEL C. BROWN, ET AL.

12. The Supreme Court of the State of Texas, in cause No. A-9340, styled CITY OF DALLAS, et al, Relators, v. HONORABLE DICK DIXON, Chief Justice, et al, Respondents, did, by written opinion dated March 15, 1963, issue its order, styled "An Original Mandamus" directing this Court to issue a writ of prohibition and other ancillary orders granting to the City of Dallas the relief sought against further prosecution of the case involving the same issues as had been previously foreclosed in the ATKINSON case. CITY OF DALLAS, ET AL V. HONORABLE DICK DIXON, Chief Justice, et al, 365 SW 2d 919. The Supreme Court overruled motion for rehearing and notice was given to this Court to comply with the order of the Supreme Court.

13. Thereafter no action was taken by respondents to cause such decision of the Supreme Court of Texas to be reviewed by the Supreme Court of the United States.

14. The Supreme Court of Texas, in its opinion, held that the parties in the case of BROWN V. CITY OF DALLAS in the Federal Court were bound by the decision in ATKINSON V. CITY OF DALLAS. In the regard the court said:

"It is immaterial that Brown is not a class action. The controlling fact is that Atkinson was a class action as authorized by Rule 42, Texas Rules of Civil Procedure; and being a class action of the hybrid type, the judgment in Atkinson binds all members of the class insofar as validity of the bonds and the right of the City to construct runways are concerned if the class was adequately represented by those who sued on behalf of the class. McDonald, Texas Civil Practice, Vol. 1, Sec. 3.37, pp. 283-284; Hovey v. Shepherd, 195 Tex. 237, 147 SW 224. The description of the plaintiffs in Brown, quoted above, shows clearly that they are members of the class represented by the plaintiffs in Atkinson, and it is not suggested that they were not adequately represented in that suit. Their right to relitigate the same issues is foreclosed by our decision in Hovey v. Shepherd, supra. This must be so. If it were not so, different groups of Dallas citizens could halt all efforts of the City to improve its airport facilities indefinitely by filing new suits. Such an absurdity cannot be tolerated."

The Supreme Court, by its opinion, also held that the issues sought to be litigated in the Federal Court are essentially the same as the issues litigated in ATKINSON to final judgment. Thus the court said:

"An analysis of the petition in Brown discloses that the issues sought to be litigated are essentially the same

as the issues litigated in Atkinson, and the prayer is for the same ultimate relief. Such additional collateral issues as are injected in Brown could, by diligence, have been litigated in Atkinson. They are, therefore, also foreclosed by the judgment in Atkinson."

16. Pursuant to direct order of the Supreme Court of Texas, this court did, on April 16, 1963, grant its Writ of Prohibition and Ancillary Orders, directed to the Respondents providing that said parties and all of them:

"together with all persons similarly situated are hereby prohibited from prosecuting, urging or in any manner seeking to litigate, as attorney and/or plaintiffs, case No. 9276 styled BROWN ET AL, V. CITY OF DALLAS, ET AL, now pending in the United States District Court for the Northern District of Texas, Dallas Division, and they and each of them, individually, and as a class, are further prohibited and enjoined from filing or instituting any litigation, lawsuits and other actions, seeking to contest the right of the City of Dallas to proceed with the construction of the parallel runway as presently proposed at Love Field situated within the City of Dallas, Texas, or from instituting and prosecuting any further litigation, lawsuits or actions in any court, the purpose of which is to contest the validity of the airport revenue bonds heretofore issued under authority of Art. 1269-J, V.A.C.S. or that might be issued under said Article for the construction of the Love Field runway and the ancillary improvement in connection therewith, or from, in any manner interfering with or casting any cloud upon, or slandering the title of, or interfering with the delivery of, the proposed bonds by the City of Dallas, any of its agents or representatives or others seeking to assist them in the sale and delivery of the same."

17. The City of Dallas filed a motion to dismiss the Brown suit in the Federal Court and at a preliminary hear-

ing in the Federal Court James P. Donovan, as attorney for the plaintiffs therein, filed a motion to dismiss certain persons as plaintiffs, but to add new party-plaintiffs. The Federal Judge granted the motion to dismiss certain plaintiffs from the suit but before permitting the new parties to intervene in that suit required assurance that the parties seeking to intervene had been warned that to actively prosecute said suit might be a contempt of this court and the orders theretofore issued by it. Attorney James P. Donovan stated to the Federal Judge that the matter had been brought to the attention of the new parties and they had been fully warned of the possible consequences of their action.

18. In spite of the Writ of Prohibition issued by this Court, attorney James P. Donovan, representing the parties in the Brown case in the Federal Court, filed an answer to the City's motion to dismiss the Brown case and actively and vigorously opposed the motion to dismiss. The basis of the attorney's opposition to such motion was that his clients had not had their day in court and that the order of this court and the order of the Supreme Court of Texas were invalid. On May 2, 1963 the Judge of the United States District Court ordered the Brown case dismissed and Respondent Donovan noted exception to such action.

19. Following the issuance of the Writ of Prohibition by this Court, attorney James P. Donovan, on behalf of himself and a number of the Respondents herein, filed Cause No. CA-3-63-120 Civil in United States District Court styled James P. Donovan, et al v. The Supreme Court of Texas, et al, in which suit it was prayed that the Federal Court grant

an injunction against the Court of Civil Appeals and the Supreme Court of Texas restraining the enforcement of the writs theretofore issued by this court. On May 9, 1963 the Judge of the United States District Court granted motion to dismiss this cause, to which action an exception was duly noted by Donovan.

20. The present motion for contempt filed by the City of Dallas in this Court alleges that respondents, and each of them, have been guilty of contempt of this Court by violating the Writ of Prohibition and injunction heretofore issued by us in the following respects:

- (a) In failing to request the Federal Court to dismiss the case of Daniel C. Brown, et al, v. City of Dallas, et al, No. 9276 pending in the United States District Court.
- (b) By filing motion contesting the dismissal of said Brown suit in the Federal Court;
- (c) That the respondents who made themselves new parties in the Federal Court case, following the issuance of our Writ of Prohibition and injunction, were guilty of contempt in knowingly aiding and abetting the further prosecution of said suit in the Federal Court;
- (d) In appearing and vigorously and actively opposing and contesting the motion to dismiss the Brown suit in the Federal Court;
- (e) By taking exceptions to the order of the Federal Court in dismissing the Brown suit;
- (f) By filing cause No. CA-3-63-120 Civil styled James P. Donovan, et al, v. Supreme Court of Texas, et al, in the United States District Court which said suit seeks to interfere with the enforcement of the Writ of Prohibition issued by this Court.

The hearing on the motion for contempt came on to be heard by this Court on May 13, 1963. Motion for continu-

ance filed by James P. Donovan, for himself and respondents, was sustained and the matter reset for May 20, 1963. On said date, May 20, 1963 the matter came on for hearing and James P. Donovan and all of the respondents who had been served with notice to appear, did appear, and announced ready for the hearing on the motion for contempt. Respondents' motion to quash the affidavit for contempt was overruled and the Court proceeded to hear testimony from both petitioners and respondents. The evidence of petitioners consisted of documentary proof relating to the matter heretofore recited and testimony of an Assistant City Attorney. The only witness who testified for respondents was attorney James P. Donovan who candidly stated that the actions and conduct on the part of all the respondents were taken upon his advice that the orders of the Supreme Court of Texas and of this Court were invalid.

The testimony presented upon this hearing abundantly demonstrates that all of the respondents are guilty of contempt of this Court. Respondents' have been shown to have knowingly violated the orders of this Court which were issued in pursuance to a mandate of the Supreme Court of Texas. Such wilfull disobedience of a valid order of a court constitutes contempt which cannot be tolerated. Respondents' contention that they have not been afforded their day in court is entirely without merit. As demonstrated by the foregoing facts, respondents have had their full day in court. The issues have been presented to twenty-three judges comprising every court from the trial court to the United States Supreme Court and these judges have, without a single dissent, decided the issues against respondents. Over a period of two

years respondents have had the benefit of every judicial hearing available in both State and Federal Courts. The issues having been adjudicated against them, they must necessarily recognize the end of litigation. There must be an end to litigation else there would be no purpose of beginning litigation.

If orders of this or any other court are to be ignored and disobeyed merely because some attorney says that they are invalid then our system of jurisprudence will fall and anarchy and chaos will result. We will have fallen upon evil days, indeed, when an attorney arrogates unto himself the function to declare invalid mandates of a court of law. Our Government of law, and not of men, does not tolerate such usurpation of power by any person and especially by an officer of the court sworn to protect and defend the constitution and laws of the nation and of this State.

During the hearing of this matter the respondent, attorney James P. Donovan, made many irresponsible statements concerning our courts which clearly demonstrates his attitude. For example he assailed the judgment of the Supreme Court of Texas contending that "it isn't worth, in our opinion, the paper it was written on." At another point he said, in effect, that he and his clients were not in contempt of this Court; that they were probably in contempt of the Supreme Court of Texas but they were not being tried for that. (Footnote 1). He admitted that, in response to an inquiry from the United States District Judge, that he had advised his clients that they were subjecting themselves to a contempt action by proceeding in the Federal Court case. The whole

record illustrates one fact clearly, that is, that the respondents, with full knowledge of the facts, followed attorney Donovan's advice and counsel to the effect that orders of the court were invalid and should be disobeyed or ignored.

Art. 1826, V.A.C.S. specifically empowers this Court to punish any person for a contempt of this Court, not to exceed \$1,000 fine or imprisonment not to exceed twenty days. As to the individual respondents we have considered the mitigating facts and circumstances, and especially that they were advised by attorney Donovan to perform the acts complained of, and have therefore set their punishment at \$200 fine. However, as to the respondent Donovan, it is our judgment that he should be assessed the maximum jail sentence of twenty days in the County Jail.

Subsequent to the entry of our original judgment several of the respondents appeared and presented additional mitigating or extenuating circumstances and as a result thereof we have amended our order, as shown by the record herein, completely exonerating twenty-six of the respondents and altering and modifying the sentence of others.

All respondents, with exceptions heretofore noted, are found guilty of contempt and assessed punishment as shown by the judgment of this Court.

PER CURIAM.

June 7, 1963

Footnote 1:

It is of interest to note other irresponsible and unlawyerlike statements made by Respondent Donovan which illustrate his general attitude towards courts. For example, he charged the Assistant City Attorney with "tampering with the Court" (referring to the Federal Court), and that he did not "believe in backdoor jurisprudence" (still referring to the United States District Court).

THE STATE OF TEXAS

I, JUSTIN G. BURT, Clerk of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas hereby certify that the foregoing seven (7) pages contain a true and correct copy of the Opinion of this Court delivered and filed in my office on June 7th, 1963 in Cause No. 16,193, City of Dallas, et al, Petitioner vs. Daniel C. Brown, et al, Respondents, as the original thereof appears on file in my office.

GIVEN under my hand and seal of said Court at office in Dallas, this the 28th day of June, 1963.

JUSTIN G. BURT

Clerk.

(SEAL)

U. S. DISTRICT COURT, INJUNCTION

May 9, 1963: The Court: "Now with reference to this case, if you will recall, both you and Mr. Bickley, though the City was not in the case, were here when you presented to me your application for a Restraining Order. At that time, I understood, as you have stated today, that you disagreed with the Supreme Court, that you felt that they had gone beyond any previous decision and beyond the authority of the Supreme Court.

At that time I said to you that I thought your remedy was a Writ of Certiorari to the Supreme Court of the United States and that I would set this case far enough off so that you could make some attempt to get it before the Supreme Court of the United States. This was filed on April 23 and I set it on this date in order to give you some time.

Now I stated to you then and I state again, that I do not consider that the Federal District Court is the Appellate Court for the Supreme Court of Texas. I think your remedy is before the Supreme Court of the United States.

In the second place the Brown case was dismissed last Thursday and there is nothing here!

Your application is to restrain the Supreme Court of Texas and the Court of Civil Appeals from interfering with you in prosecuting a case which has now been dismissed, so that I consider it moot. However I am going to give you all your hearings and this Application for the Temporary injunction is denied.

May 16, 1963—For the reasons previously stated and without repeating, the Motion to Dismiss is sustained."

U. S. DISTRICT COURT, BROWN**OPINION—BROWN**

May 2, 1963—As you both know, I have read the pleadings in this case. I have likewise read the Opinions of both the Supreme Court and the Court of Civil Appeals, and incidentally, I think very highly of the Chief Justice of the State of Texas, who wrote the opinion in the Supreme Court case, and I know that he does a great deal of research and his Opinions are written very carefully.

The parties are the same, since the Atkinson case was brought as a class action and so includes all of the parties in that neighborhood.

The issues that are sought to be litigated in the case in the Federal Court have been held by the Supreme Court to be the same as the issues which have been litigated in the Atkinson case.

The prayer for relief is similar.

In my opinion there is no justiciable issue to be presented in the Federal Court case. All the issues have been decided in the Atkinson case.

I consider that you are attempting to make me an Appellate Court for the Supreme Court, and that your appeal is to the Supreme Court of the United States and not to this Court.

You and the litigants in this case have been prohibited from proceeding in this case and therefore I dismiss the case as asked by the City Attorney's office.

**SUPREME COURT OF TEXAS, MANDAMUS
IN THE SUPREME COURT OF TEXAS**

No. A-9340

March 13, 1963.

CITY OF DALLAS *et al.*,

v.

HONORABLE DICK DIXON, CHIEF JUSTICE, *et al.*

Original Mandamus.

This cause came on to be heard on petition for writ of mandamus, filed herein on December 6, 1962, and the said petition together with the record and briefs and argument of counsel having been duly considered, because it is the opinion of the Court that the petition should be granted, and a writ of mandamus conditionally issued, it is therefore *adjudged, ordered* and *decreed* that unless the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas enforces its judgment in the case of George S. Atkinson *et al.* vs. City of Dallas, No. 16038 on the docket of said Court, by issuing whatever writs are necessary and effective, in accordance with the opinion of this Court herein this day delivered, the Clerk of this Court will issue a peremptory writ of mandamus commanding, compelling and requiring said Court of Civil Appeals so to do.

It is further ordered that respondents, Paul A. Crick, Dr. Hobson Crook, George H. Harmon, James H. Parr, Martin E. Collis, Jr., J. W. Slaughter, James E. Strum, Floyd R. Raupe, George S. Atkinson, Vernon C. Pampell, Paul H. Crawford, E. T. Busch, V. C. Bilbo, W. H. Richardson, Aus-

tin Crow, J. G. Garrett, E. W. Quinton, Dr. Grant Boland, L. E. Dease, H. P. McDonald, M. J. Pellillo, J. D. Lowrie, S. R. Kirby, Charles Williamson, Jean Shaw, W. Claude Jones, James W. Odom, Reveau & Virginia Bassett, Walter Sodeman, Mr. & Mrs. O. L. Whitman, Mr. & Mrs. J. Walter Long, Jr., Mrs. Charles J. Butler, C. H. Asel, Lee R. Slaughter, Frank Grimes, Winston C. Jones, C. O. Crudgington, Daniel C. Brown, J. W. Tomlin, William Darrell Graves, George B. Lotridge, Lloyd S. Carter and Arthur E. Tappan, and their attorney of record, James P. Donovan, jointly and severally, pay all costs in this proceeding in this Court, for which execution may issue.

(Opinion of the Court by Robert W. Calvert, Chief Justice)

* * * *

**SUPREME COURT OF TEXAS, REHEARING
IN THE SUPREME COURT OF TEXAS**

April 10, 1963.

No. A-9340.

CITY OF DALLAS *et al.*,

vs.

HONORABLE DICK DIXON, CHIEF JUSTICE, *et al.*

Original Mandamus.

Motion of respondents, except the Justices of the Court of Civil Appeals, for rehearing, filed in the above numbered and entitled cause on March 28, 1963, having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

* * * * *

COURT OF CIVIL APPEALS, CONTEMPT**U. S. District Court, Brown****THE STATE OF TEXAS****TO ANY SHERIFF OR ANY CONSTABLE WITHIN
THE STATE OF TEXAS—GREETINGS:**

WHEREAS, on the 20th day of May, 1963, in the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, Dallas County, Texas, in a matter entitled City of Dallas, a Municipal Corporation, et al, Petitioners, v. Daniel C. Brown, et al, Respondents, No. 16,193, the City of Dallas made complaint supported by affidavits and a motion for contempt requesting the Court to cite James P. Donovan to show cause as to why he should not be held in contempt of this Court and punished therefor for the conduct alleged in said motion; and,

WHEREAS, upon the filing of said motion, the said James P. Donovan was given due and full notice to appear before said Court and show cause why he should not be held in contempt of said Court; and,

WHEREAS, the said James P. Donovan did appear before said Court and filed his answer contesting the grounds for such contempt; and,

WHEREAS, upon hearing of the complaint, the answer and all of the evidence offered and the full proof as to the acts of contempt therein charged, the Court on May 22, 1963 entered final judgment adjudging James P. Donovan in contempt of such Court and fixing as his punishment confinement in the County Jail of Dallas County, Texas, for a

period of twenty (20) consecutive days, beginning on this the 22nd day of May, 1963, a copy of which Judgment is attached hereto as Exhibit "A" and made a part hereof.

Now, Therefore,

You are commanded to take the body of the said James P. Donovan and safely keep him in custody in the County Jail of Dallas County, Texas, without bail, until he shall purge himself of the contempt by being confined in the County Jail of Dallas County, Texas, for said period of twenty (20) consecutive days, as set out in said Judgment and Order of the Court.

WITNESS THE Honorable Dick Dixon, Chief Justice of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, Texas, this the 22nd day of May, 1963.

(Signed) DICK DIXON

DICK DIXON, Chief Justice of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, Texas.

(Signed) JUSTIN G. BURT

Clerk of the Court of Civil Appeals for the Fifth Supreme Judicial District Court of Texas at Dallas, Texas.

(SEAL)

ISSUED THIS THE 22nd day of May, 1963.

(Signed) JUSTIN G. BURT

Clerk of the Court of Civil Appeals for the Fifth Supreme Judicial District Court of Texas at Dallas, Texas.

NO. 16193

CITY OF DALLAS,

v.

DANIEL C. BROWN, *et al.*IN THE COURT OF CIVIL APPEALS FOR THE
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

JUDGMENT OF CONTEMPT

This the 20th day of May, 1963, came on to be heard the above entitled and numbered matter, which had previously been set for the 13th day of May, 1963, but on motion and supplemental motion for continuance made by James P. Donovan as attorney for the Respondents, the same was continued by order of the Court until this date, and in which cause George Atkinson, Harvey Bell, U. J. Boland, Daniel C. Brown, Mary Brown, Martin E. Collis, Jr., Norma June Collis, Paul H. Crawford, Nora Crawford, Paul A. Crick, Anne K. Crick, Dr. Hobson Crook, Russell Moore Crook, Austin Crow, Alberta R. Crow, L. A. Danek, Fred M. Gore, Frank Grimes, Lena Mae Grimes, Geneva Hood, Wayne Hood, William C. Isom, W. C. Jones, P. D. King, Nancy King, R. C. Logan, Marion Logan, Janet McCluer, H. P. McDonald, James W. Odom, Helen Odom, J. H. Parr, Joan S. Parr, M. J. Pellillo, Zelma Pellillo, R. L. Pitt, Pauline Pitt, Jessie Powell, Dee Powell, W. H. Richardson, Marion Lee Siegel, J. W. Slaughter, Jr., Christine C. Slaughter, Walter Sodeman, James E. Strum, Linnis Strum, J. W. Tomlin, Charline Tomlin, M. E. Worrell, Jr., Lucille Worrell, Harvey Waldman, Evelyn Waldman, Audrey M. Karr,

William G. Byars, Mrs. L. A. Danek, Mrs. Arlene E. Davis, Donald S. Reckrey, Caroline Rogers, Russell G. Rogers, Dorothy Boland, Dr. Grant Boland, Jack H. Broom, Jane Broom, C. D. Crudgington, James P. Donovan, Mary R. Gore, J. H. Huddleston, Juanita Isom, Arvil Jarman, Mary Jarman, George B. Lotridge, Browning Lotridge, J. D. Lowrie, Jr., Lillian Lowrie, Lometta McDonald, Dorothy Lusk Myrick, S. A. Myrick, Lewis A. Park, Lola E. Park, Anna Marie Pylant, Calvin Pylant, Geneva Quinton, E. W. Quinton, Faye Richardson, Arthur G. Rudkin, Helen Rudkin, Patricia P. Dukelow, Emily F. Slaughter, Lee R. Slaughter and Alberta M. Turrill were, pursuant to due complaint, (which is found to be legal and to state good grounds therefore) ordered to show cause why they should not be punished as for contempt for their conduct in such complaint and order specified, to-wit:

George Atkinson,
Harvey Bell,
U. J. Boland,
Daniel C. Brown,
Mary Brown,
Martin E. Collis, Jr.,
Norma June Collis,
Nora Crawford,
Paul H. Crawford,
Anne K. Crick,
Paul A. Crick,
Dr. Hobson Crook,
Russell Moore Crook,
Alberta R. Crow,
Austin Crow,
L. A. Danek,
Frank Grimes,

Lena Mae Grimes,
Fred M. Gore,
Geneva Hood,
Wayne Hood,
William C. Isom,
W. C. Jones,
Nancy King,
P. D. King,
Marion Logan,
R. C. Logan,
H. P. McDonald,
Janet McCluer,
Helen Odom,
James W. Odom,
J. H. Parr,
Joan S. Parr,
M. J. Pellillo,

Zelma Pellillo,
 Pauline Pitt,
 R. L. Pitt,
 Jessie Powell,
 Dee Powell,
 W. H. Richardson,
 Marion Lee Siegel,
 Christine C. Slaughter,

J. W. Slaughter, Jr.,
 Walter Sodeman,
 James E. Strum,
 Linnis Strum,
 Charline Tomlin,
 J. W. Tomlin,
 Lucille Worrell,
 M. E. Worrell, Jr.,

in that they:

- (a) Failed to request the United States District Court to dismiss Cause No. 9276, styled Daniel C. Brown et al v. City of Dallas et al;
- (b) Contested the dismissal of the cause of Daniel C. Brown, et al v. City of Dallas et al, No. 9276, pending in the United States District Court;
- (c) Took exception preparatory to appeal of the order of the United States District Court dismissing Cause No. 9276 styled Daniel C. Brown et al v. City of Dallas et al; and
- (d) Filed Cause No. CA-3-63-120 Civil, in the United States District Court styled James P. Donovan et al v. The Supreme Court of Texas, et al;

and Audrey M. Karr in that she:

- (a) Joined as a party Plaintiff in Cause No. 9276 in the United States District Court styled Daniel C. Brown et al v. City of Dallas et al;
- (b) Contested the dismissal of the cause of Daniel C. Brown et al v. City of Dallas et al, No. 9276, pending in the United States District Court;
- (c) Took exception preparatory to appeal of the order of the United States District Court dismissing Cause No. 9276 styled Daniel C. Brown et al v. City of Dallas et al; and

(d) Filed Cause No. CA-3-63-120 Civil, in the United States District Court styled James P. Donovan et al v. The Supreme Court of Texas, et al;

and

William G. Byars,
Mrs. L. A. Danek,
Mrs. Arlene E. Davis,

Donald S. Reckrey,
Caroline Rogers,
Russell G. Rogers,

in that they:

- (a) Joined as parties Plaintiff in Cause No. 9276 in the United States District Court, styled Daniel C. Brown et al v. City of Dallas et al;
- (b) Contested the dismissal of the cause of Daniel C. Brown et al v. City of Dallas et al, No. 9276, pending in the United States District Court;
- (c) Took exception preparatory to appeal of the order of the United States District Court dismissing Cause No. 9276, styled Daniel C. Brown et al v. City of Dallas, et al;

and

Dorothy Boland
Dr. Grant Boland
Jack H. Broom
Jane Broom
C. D. Crudgington
James P. Donovan
Mary R. Gore
Juanita Isom
Arvil Jarman
Mary Jarman
Browning Lotridge
George B. Lotridge
J. D. Lowrie, Jr.

Lillian Lowrie
Lometta McDonald
Dorothy Lusk Myrick
S. A. Myrick
Lewis A. Park
Lola E. Park
Anna Marie Pylant
Calvin Pylant
Geneva Quinton
E. W. Quinton
Faye Richardson
Arthur G. Rudkin
Helen Rudkin

in that they did file Cause No. CA-3-63-120 Civil, in the United States District Court styled James P. Donovan et al v. The Supreme Court of Texas et al, and

Patricia P. Dukelow
Emily F. Slaughter

Lee R. Slaughter
Alberta M. Turrill

in

- (a) Failing to request the United States District Court to dismiss Cause No. 9276 styled Daniel C. Brown et al v. City of Dallas et al;
- (b) Contesting the dismissal of the cause of Daniel C. Brown et al v. City of Dallas et al, No. 9276, pending in the United States District Court;
- (c) Taking exception preparatory to appeal of the order of the United States District Court dismissing Cause No. 9276 styled Daniel C. Brown et al v. City of Dallas et al; and

it appearing to the Court that each of the said Respondents has been duly cited to appear and answer herein and that they and each of them has filed answer, and the said James P. Donovan after filing an appearance filed a Motion to Quash, which was overruled, and the Court having heard the same, as well as the complaint, due proof of such contempt, and the evidence offered by James P. Donovan, who was the only Respondent who testified and who in his testimony testified that he had advised his clients, the other Respondents herein, in writing that the Order of this Court issued on the 16th day of April, 1963, was invalid and that

they were not required to obey it and that each of the Respondents who did not request to be dropped from the pending cases in the Federal Court authorized him in writing to proceed with the prosecution of the same, and who further stated to the Court as attorney for the Respondents that he had advised them not to testify before this Court on this hearing, and each of the Respondents when offered opportunity by the Court to testify in person refused to do so, and the Court having further heard the argument of counsel of both parties is of the opinion that the said Respondents are, each and every one guilty of contempt of this Court by reason of the acts alleged and proved, as hereinabove specifically set forth.

It appearing that the Respondents B. D. Siegel, G. C. Karr, Harriet G. Crudington, Arthur B. MacKinstry III, June C. MacKinstry and Winton R. Dukelow were not served with notice of the Order to Show Cause and did not appear in Court in person or by attorney, no judgment is rendered against them, but the cause against each of them shall remain pending service of notice and hearing.

It further appearing to the Court that the Respondents J. H. Huddleston, Harvey Waldman, Evelyn Waldman, Amy Rose Garrett, J. O. Garrett, Besa Fairtrace Short and Paul Short have absolved themselves of any contempt of this Court and will obey the orders of the Court, no punishment is adjudged against them, except they shall pay the proportionate part of the costs due by each of them, for which execution shall issue.

IT IS THEREFORE ORDERED, ADJUDGED AND
DECREE'D by this Court that

George Atkinson,
Harvey Bell,
Dorothy Boland,
Dr. Grant Boland,
U. J. Boland,
Jane Broom,
Daniel C. Brown,
Jack H. Broom,
Mary Brown,
William G. Byars,
Martin E. Collis, Jr.,
Norma June Collis,
Nora Crawford,
Paul H. Crawford,
Anne K. Crick,
Paul A. Crick,
Dr. Hobson Crook,
Russell Moore Crook,
Alberta R. Crow,
Austin Crow,
C. D. Crudgington,
L. A. Danek,
Mrs. L. A. Danek,
Mrs. Arlene E. Davis,
Patricia P. Dukelow,
Fred M. Gore,
Mary R. Gore,
Frank Grimes,
Lena Mae Grimes,
Geneva Hood,
Wayne Hood,
Juanita Isom,
William C. Isom,
Arvil Jarman,
Mary Jarman,
W. C. Jones,
Audrey M. Karr,

Nancy King,
P. D. King,
Marion Logan,
R. C. Logan,
Browning Lotridge,
George B. Lotridge,
J. D. Lowrie, Jr.,
Lillian Lowrie,
Janet McCluer,
H. P. McDonald,
Lometta McDonald,
Dorothy Lusk Myrick,
S. A. Myrick,
Helen Odom,
James W. Odom,
Lewis A. Park,
Lola E. Park,
J. H. Parr,
Joan S. Parr,
M. J. Pellillo,
Zelma Pellillo,
Pauline Pitt,
R. L. Pitt,
Dee Powell,
Jessie Powell,
Anna Marie Pylant,
Calvin Pylant,
Geneva Quinton,
E. W. Quinton,
Donald S. Reckrey,
Faye Richardson,
W. H. Richardson,
Caroline Rogers,
Russell G. Rogers,
Arthur G. Rudkin,
Helen Rudkin,
Marion Lee Siegel,

Christine C. Slaughter,
Emily F. Slaughter,
J. W. Slaughter, Jr.,
Lee R. Slaughter,
Walter Sodeman,
James E. Strum,

Linnis Strum,
Charline Tomlin,
J. W. Tomlin,
Alberta M. Turrill,
Lucille Worrell,
M. E. Worrell, Jr.,

Respondents, be and they are hereby adjudged to be in contempt of this Court, and the punishment of each is a fine in the amount of Two Hundred (\$200.00) Dollars to be paid by each and every one of them on or before the twenty-seventh (27) day of May, 1963 at five (5) o'clock in the afternoon, to the Clerk of this Court.

IT IS THE FURTHER ORDER, JUDGMENT AND DECREE of this Court that upon failure of the said Respondents to pay the fines hereinabove assessed within the time hereinabove specified, each of said Respondents so failing shall be imprisoned in the County Jail of Dallas County, Texas, without bail, until such time as said Respondents shall have purged himself or herself of said contempt by payment of the fine as herein assessed against him or her, or until the further orders of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Respondent James P. Donovan be, and he is hereby, adjudged to be in contempt of this Court and that his punishment be confinement in the County Jail of Dallas County, Texas, without bail, for a period of twenty (20) consecutive days beginning on this date; and that he be remanded forthwith to the custody of the Sheriff of Dallas County, Texas, for the purpose of such confinement.

The costs of this cause are hereby taxed against all of the above Respondents pro rata, for which let execution issue.

THE STATE OF TEXAS

I, Justin G. Burt, Clerk of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, hereby certify that the above and foregoing is a true and correct copy of **COMMITMENT WITH COPY OF JUDGMENT OF CONTEMPT** attached, now on file in my office, in cause No. 16,193, City of Dallas, et al, Petitioners, vs. Daniel C. Brown, et al, Respondents.

GIVEN UNDER MY HAND AND SEAL OF SAID Court, at office in Dallas, this the 28th day of June, 1963.

JUSTIN G. BURT:

Clerk.

IT IS FURTHER ORDERED by the Court that the Clerk of this Court shall issue the necessary commitments and executions to carry into effect the terms and provisions of this judgment.

Signed, rendered and entered upon the minutes of this Court, at Dallas, Texas, this 22nd day of May, 1963.

DICK DIXON

Dick Dixon, Chief Justice.

CLAUDE WILLIAMS

Claude Williams,
Associate Justice.

HAROLD A. BATEMAN

Harold A. Bateman,
Associate Justice.

U. S. DISTRICT COURT, BROWN

No. 9276 Civil

In the

UNITED STATES DISTRICT COURT

For the Northern District of Texas

Dallas Division

DANIEL C. BROWN, et al.,

Plaintiffs,

v.

CITY OF DALLAS, et al.,

Defendants.

ORDER DISMISSING SUIT.

This, the second day of May, 1963, came on to be considered the Motion of the City of Dallas, et al, Defendants in the above entitled and numbered cause, to dismiss this cause and all parties having appeared by attorneys and the Court, having considered the pleadings, the evidence submitted to the Court and argument of counsel, is of the opinion that said cause is without merit and should be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT the Plaintiffs take nothing and that this cause be dismissed in all things and that costs be adjudged against the Plaintiffs, for which let execution issue.

Entered on this 9th day of May, A.D., 1963.

SARAH T. HUGHES,

Judge presiding

Approved as to form

James P. Donovan

Attorney for Plaintiffs

U. S. DISTRICT COURT, BROWN APPEAL

No. 9276

In the

UNITED STATES DISTRICT COURT

For the Northern District of Texas

DANIEL C. BROWN, et al.,

v.

CITY OF DALLAS, et al.,

ORDER DISMISSING APPEAL

THIS THE 14 day of June, 1963, came on to be considered by the Court the Petition of James P. Donovan, attorney for the Appellants in the above entitled and numbered cause, to dismiss said appeal, and it appearing to the Court that all but three of the Appellants have previously heretofore withdrawn from this cause on their own written request, the Court is of the opinion that the appeal should be dismissed.

IT IS, THEREFORE, THE ORDER, JUDGMENT AND DECREE of this Court that the Petition of James P. Donovan on behalf of the Appellants to dismiss the appeal is hereby granted and said cause and the appeal of the same is hereby dismissed, and that all costs of suit shall be taxed against the Appellants herein, for all of which let execution issue.

ENTERED this 14 day of June, 1963.

SARAH T. HUGHES

Judge of the United States
District Court, Northern
District of Texas

U. S. DISTRICT COURT, INJUNCTION

No. CA-3-63-120

In the

UNITED STATES DISTRICT COURT

Northern District of Texas

Dallas Division

JAMES P. DONOVAN, et al.,

Plaintiffs,

v.

SUPREME COURT OF TEXAS, et al.,

Defendants.

ORDER OF COURT

This the 16th day of May, 1963, came on to be heard the above entitled and numbered cause on the motion of the Defendants to dismiss, and all parties having appeared by counsel, the Court having considered the motion to dismiss and the argument of counsel, and having considered the motion of the Plaintiffs to exclude matters alleged by them to be extraneous, being the exhibits attached to Defendants' Answer and Motion to Dismiss, is of the opinion that the Plaintiffs' motion should be overruled and that the Defendants' Motion to Dismiss should be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiffs' motion to exclude the exhibits attached to Defendants' pleadings as being extraneous is hereby overruled.

IT IS FURTHER ORDERED, ADJUDGED AND
DECREED that the Defendants' Motion to Dismiss be and
it is in all things hereby granted, and said cause is dismissed.

All costs herein are adjudged against the Plaintiffs, for all
of which let execution issue.

ENTERED this the 21 day of June, 1963.

SARAH T. HUGHES,

Judge Presiding

APPROVED AS TO FORM:
JAMES P. DONOVAN
Attorney for Plaintiffs

ALLEGED WRIT OF PROHIBITION

No. 16,193

CITY OF DALLAS, *et al.*,
Petitioners, } WRIT OF PROHIBITION
v. } AND
DANIEL C. BROWN, *et al.*, } ANCILLARY ORDERS
Respondents. }

On this the 16th day of April, 1963, came on to be considered the matter of the issuance of a writ of prohibition and ancillary orders in compliance with the judgment and orders of the Supreme Court of Texas handed down March 13, 1963, in Cause No. A-9340, City of Dallas et al v. Honorable Dick Dixon, Chief Justice, et al, in which cause a motion for rehearing was overruled by the Supreme Court of Texas on April 10, 1963.

In this cause, the City of Dallas, together with certain of its officials and other interested parties, as Petitioners, seeks a writ of prohibition and ancillary orders against Daniel C. Brown, Mary Brown, R. L. Pitt, Pauline Pitt, Harvey Bell, Austin Crow, Alberta R. Crow, Frank Grimes, Lena Mae Grimes, Winton R. Dukelow, Patricia P. Dukelow, W. H. Richardson, Faye Richardson, B. D. Siegel, Marion Lee Siegel, Charles Williamson, Jerry Williamson, Paul A. Crick, Anne K. Crick, E. W. Quinton, Geneva Quinton, W. C. Jones, U. J. Boland, Dorothy Boland, Arthur G. Rudkin, Helen Rudkin, James E. Strum, Linnis Strum, Paul M. Crawford, Nora Crawford, Martin E. Collis, Jr., Norma June Collis, Arthur E. Tappan, Bettie Tappan, E. Gardner Clapp, Stella Clapp, George Atkinson, Jack H. Broom, Jane

Broom, George B. Lotridge, Browning Lotridge, J. W. Tomlin, Charline Tomlin, H. P. McDonald, Lometta McDonald, J. D. Lowrie, Jr., Lillian Lowrie, Anna Marie Pylant, Calvin Pylant, Lewis A. Park, Lola E. Park, S. A. Myrick, Dorothy Lusk Myrick, Robert L. Brackett, William C. Isom, Juanita Isom, E. T. Cramer, Walter Sodeman, Lee R. Slaughter, Emily F. Slaughter, J. H. Parr, Joan S. Parr, J. W. Slaughter, Jr., Christine C. Slaughter, R. F. Slaughter, James W. Odom, Helen Odom, S. R. Birby, M. J. Pellillo, Zelma Pellillo, Jean Shaw, C. D. Crudgington, Harriett G. Crudgington, Dr. Hobson Crook, Russell Moore Crook, J. O. Garrett, Amy Rose Garrett, Paul Short, Besa Fairtrace Short, R. C. Logan, Marion Logan, Dee Powell, Jessie Powell, Arthur B. MacKinstry, III, June C. MacKinstry, James H. Murray, E. T. Busch, Louise Busch, P. D. King, Nancy King, M. E. Worrell, Jr., Lucille Worrell, Dr. Grant Boland, J. F. McClain, Charlene McClain, Fred M. Gore, Mary R. Gore, L. A. Danek, Lawrence R. Schmidt, Wayne Hood, Geneva Hood, J. M. Berry, Ethel Berry, C. J. Bitter, Patricia Bitter, Janet McCluer, Forrest McKee, Dorothy McKee, James O. Boyd, Robie Boyd, Alberta M. Turrill, Arvil Jarman, Mary Jarman, William S. Holden, Virginia Holden, Harvey Waldman, Evelyn Waldeman, J. W. McCulley, J. H. Huddleston, Richard Zacha, individually and as taxpayers and landowners in the City of Dallas and as representatives of a class of taxpayers and residents and landowners in the vicinity of Love Field; and James P. Donovan, individually and as the attorney for the other parties, all as Respondents, which said cause was heard by this Court and the decision therein was handed down on the 24th day of October 1962.

And this Court being of the opinion that in order to comply with the orders and instructions of the Supreme Court of Texas, it is necessary to set aside and hold for naught our judgment heretofore entered in this cause on the 24th day of October 1962, in which cause motion for rehearing was overruled on November 23, 1962;

It is therefore ORDERED, ADJUDGED and DECREED that the judgment heretofore rendered in this cause by this Court on October 24, 1962, is set aside and held for naught, and said cause of action is restored to the docket of pending causes to await further orders of court.

It is further ORDERED, ADJUDGED and DECREED that the said James P. Donovan, individually and as attorney, and any other agents, attorneys or representatives, of the Respondents herein, and the Respondents each and every one, individually and as a class of taxpayers and residents and landowners in the vicinity of Love Field, together with all other persons similarly situated, are hereby prohibited from prosecuting, urging or in any manner seeking to litigate, as attorney and/or plaintiffs, Civil Case No. 9276 styled Brown et al v. City of Dallas et al, now pending in the United States District Court for the Northern District of Texas, Dallas Division, and they and each of them, individually and as a class are further prohibited and enjoined from filing or instituting any litigation, lawsuits or other actions seeking to contest the right of the City of Dallas to proceed with the construction of the parallel runway as presently proposed at Love Field situated within the City of Dallas, Texas, or from instituting and prosecuting any further lit-

gation, lawsuits or actions in any court, the purpose of which is to contest the validity of the airport revenue bonds heretofore issued under authority of Article 1269j, V.A.C.S., or that might be issued under said Article for the construction of the Love Field runway and the ancillary improvements in connection therewith, or from in any manner interfering with, or casting any cloud upon, or slandering the title of, or interfering with the delivery of, the proposed bonds by the City of Dallas, any of its agents or representatives or others seeking to assist them in the sale and delivery of the same.

All of the Respondents herein, individually and as a class, and others in the same class, are further prohibited and enjoined from in any manner interfering with the enforcement and execution of the judgment in the case of *Atkinson et al v. City of Dallas*, reported at 353 S. W. 2d 275.

By issuance of this Writ, this Court does hereby give notice to all of the parties herein, their agents, attorneys and representatives, individually and as a class, and to any and all other persons of the same class or attempting to represent these individuals or others in the same class, that it will take such action as may be necessary to prohibit and enjoin the filing of any other vexatious or harassing litigation seeking to relitigate any of the issues raised, or that could have been raised, in this cause or in the case of *Atkinson et al v. City of Dallas, supra*, or from in any manner interfering with this writ of prohibition and the full enforcement of the fruits of the judgment of the *Atkinson et al v. City of Dallas* case, under pain of contempt of this Court.

IT IS FURTHER ORDERED that the Respondents herein and as herein named and their attorney of record, James P. Donovan, jointly and severally, pay all costs in this proceeding, together with all costs in the original action herein styled City of Dallas, et al. v. Brown, et.al., for all of which execution may issue.

THEREFORE, We command you to observe the Order of our said Court of Civil Appeals in this behalf and in all things to have it duly recognized, obeyed and executed and notice is hereby given to you by and through your attorney, James P. Donovan, on whom a copy of this Order has been served in person, and a copy of the same shall be mailed to each Respondent by the Clerk of this Court.

WITNESS the Honorable Dick Dixon, Chief Justice of our said Court of Civil Appeals with the Seal hereunto set at the City of Dallas, Texas, this the 16th day of April, A.D. 1963.

DICK DIXON

Honorable Dick Dixon, Chief Justice,
Court of Civil Appeals for the Fifth
Supreme Judicial District of Texas:
at Dallas

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No. 264

In the

Supreme Court of the United States

OCTOBER TERM 1963

JAMES P. DONOVAN, *et. al.*,

Petitioners,

v.

CITY OF DALLAS, *et. al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI

H. P. KUCERA,
501 City Hall,
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No. 264

In the

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OCTOBER TERM 1963

JAMES P. DONOVAN, et. al.,

Petitioners,

v.

CITY OF DALLAS, et. al.,

Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI**

JURISDICTION

No substantial federal question is presented in this case and therefore no jurisdiction exists to review the decision of the Supreme Court of Texas entered March 13, 1963, in *City of Dallas, et al v. Honorable Dick Dixon, et al*, nor the contempt judgment of the Court of Civil Appeals entered May 22, 1963, in *City of Dallas, et al v. Brown, et al* and *James P. Donovan, Atty. Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, and *Arizona v. California*, 283 U. S. 423.

No jurisdiction, original or appellate, exists in this Court to review the actions of the United States District Court in dismissing *Brown, et al v. City of Dallas, et al* (pp. 55a and 56a App. to Petition) and the action of the court in dismissing *Donovan, et al v. Supreme Court of Texas, et al* (p. 57a, App. of Petition). 28 U. S. C. A., Sec. 1291; Sec. 1251-1257 incl.

The question of whether the Supreme Court of Texas has original or appellate jurisdiction over the actions of the Texas Court of Civil Appeals, an inferior court, presents no federal question.

The judgment of the Court of Civil Appeals which held Petitioners in contempt of court for disobedience of the orders of that Court issued to enforce its judgment in the case of *Atkinson v. City of Dallas*, 353 S. W. 2d 275, and in which this Court denied a Writ of Certiorari, 8 L. Ed. 2d 808, is not based upon any federal ground as none of the grounds set forth in Rule 19 of the United States Supreme Court Rules as a requisite to the jurisdiction of this Court, is presented by the petition.

QUESTIONS PRESENTED

Petitioners state (pp. 5 and 6 of Petition) that there are eight questions presented in this case. Respondents believe that the questions presented in this case are simply these:

- (1.) Does this Court have jurisdiction to review the constitutional and statutory jurisdiction of the Texas Supreme Court, either appellate or original, over the

actions of the Texas Court of Civil Appeals, which is an inferior court in the Texas Judiciary?

(2) May the Texas Court of Civil Appeals hold in contempt the attorney and parties litigant before it after according due process as follows:

(a) Issued an injunctive and prohibitory order as required by the Supreme Court of Texas;

(b) Given notice of this order by mail to all the parties and the attorney representing them;

(c) As conclusive evidence of all parties having due notice of this order, the attorney in his own name and other parties litigant, filed Civil Cause styled *James P. Donovan et al v. Supreme Court of Texas et al* in the United States District Court to enjoin the Supreme Court and the Court of Civil Appeals from enforcing the injunction and prohibitive orders.

(d) After application made, issuing and serving on each party a show cause order to show why they should not be held in contempt;

(e) After making appearance on his own behalf and other parties litigant, the Attorney made application for a continuance of the hearing on the show cause order in the contempt proceedings. This motion was granted and an additional seven days were allowed.

(f) Held a full hearing in which each party was present in person or by attorney, and at which

each was given an opportunity to show why he was not in contempt, but each refused to testify on advice of counsel, who did testify?

(3) May the Texas Court of Civil Appeals issue an injunction against parties litigant before it to restrain and prohibit them from prosecuting a subsequently filed suit in Federal Court which the Supreme Court of Texas has ruled sought to litigate the same issues as had already been decided by the Texas Court and which amounted to vexatious and harassing litigation?

(4) May the United States District Court, after notice of appeal has been given, but the case has not been docketed in the Circuit Court of Appeals, dismiss the appeal on motion of the appellants?

STATEMENT OF THE CASE

The per curiam opinion of the Court of Civil Appeals in the contempt proceedings (368 S. W. 2d 240 and also appearing at pp. 27a through 37a inclusive of the Appendix to Petitioners' Application for Writ of Certiorari) correctly states and reviews the history of this extensive and prolonged litigation.

Following the judgment of the Court of Civil Appeals holding the Petitioners in contempt and assessing penalties and ordering the imprisonment of the attorney, the attorney on two occasions applied for a writ of habeas corpus to the Supreme Court of Texas to be released. On both occasions the Supreme Court of Texas declined to do so. On the day following the action of the Supreme Court, Attorney Dono-

van applied to one of the judges for the United States District Court for the Northern District of Texas for similar relief, which was likewise denied. Thereafter Donovan applied for a writ of habeas corpus to the United States Circuit Court of Appeals for the Fifth Circuit for similar relief, which appears as No. 450 - Misc. In the Matter of: James P. Donovan, on Habeas Corpus, and on May 30, 1963, that Court entered the following order:

"Before HUTCHESON, GEWIN and BELL, Circuit Judges.

"BY THE COURT:

"Pursuant to the provisions of Title 28 U.S.C.A., Section 2241(b), each of the Judges composing this Court declines to entertain an application for writ of habeas corpus, and the said writ is hereby, DENIED."

The record of the Contempt Proceedings before the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas in this cause consists of 238 pages. The hearing started on May 20, 1963. At the start of the hearing the Court checked the appearance of each party, documented evidence was produced together with oral testimony, and Petitioner Donovan testified beginning at page 207 through page 223.

At the conclusion of this evidence the Court took the case under advisement, and delivered its findings and judgment on May 22, 1963, at which time the petitioners and their attorney were present. The testimony given by Donovan is reflected in the Court's Per Curiam Opinion which is part of this record. A reading of that testimony and his argu-

ments which are reported as part of the record and the statements made in this Petition, particularly at the bottom of page 16 and top of page 17 (which are outside of the record) bespeak his attitude toward the Courts.

Petitioners take the position that the *Atkinson* case did not litigate the validity of the prior outstanding airport revenue bonds of the City of Dallas as none of the bondholders were parties to the *Atkinson* suit. This ground is untenable because the existence of the prior outstanding bonds was then an established fact at the time of the filing of the *Atkinson* suit and Petitioners (litigants in that case) and in their capacity, could have and should have litigated all matters dealing with the questions raised, and particularly the validity of the statute under which these bonds and the prior bonds were issued.

Petitioners also state that the injunction by the Texas Court of Civil Appeals denies to them the right to have the plea of res judicata determined in the Federal Court. This matter was taken care of by the opinion of the Supreme Court of Texas in *City of Dallas et al. v. Honorable Dick Dixon et al.*, 365 S. W. 2d 919, wherein the Court stated:

"All of these issues and all subsidiary issues raised by the pleadings but not here mentioned, as well as all issues which by diligence could have been raised and tried, were determined and foreclosed against the plaintiffs by the judgment of the Court of Civil Appeals affirming summary judgment against them in *Atkinson v. City of Dallas*. * * *

There is one thing that is extremely pertinent to this type of law suit that distinguishes it from all other types of law suits: The issuance and sale of the bonds do not depend on whether or not the case can be successfully litigated. The mere filing of the case itself prevents the issuance of the bonds regardless of the merits of such a law suit.

I.

No substantial Federal question is raised by the Petition.

Petitioners state that a Federal decision closely paralleling this action is the case of *Supreme Tribe B-H v. Cauble*, 235 U. S. 356, 65 L. Ed. 673, 41 S. Ct. 338, which was reversed by the Court in *Toucey v. N. Y. Life Insurance Co.*, 62 S. Ct. 139, 314 U. S. 118, 86 L. Ed. 100.

However, it should be remembered (and Petitioners failed to call the Court's attention to the fact) that the U. S. Statute (28 U. S. C. A. 2283 which was the basis of the *Toucey* decision) was subsequently amended by the Congress and the effect of this amendment was to nullify the decision and the footnote to the Statute so states. *Jacksonville Blow Pipe Co. v. Reconstruction Finance Corp.*, 244 F. 2d 394; *Southern California Petroleum Corp. v. Harper*, 273 F. 2d 715.

Petitioners claim they have been denied their civil rights in that they were not allowed an opportunity to vote upon the issuance of the revenue bonds. The Texas Constitution does not require as a prerequisite to the issuance of revenue bonds, that the proposition be submitted to the otherwise qualified voters. The matter of whether or not bonds (either

general obligation or revenue bonds) can or cannot be issued by a city like Dallas with or without a vote of the qualified voters, is wholly statutory. See *Art. 701, 1925 Rev. Civ. Stats., of Texas. Moller v. City of Galveston*, 57 S. W. 1116.

Since the Texas Constitution does not grant to Petitioners the right of franchise on the question of whether revenue bonds can be issued then Petitioners' claim that they were denied their civil rights of franchise by issuing the bonds without an election is wholly unfounded.

Revenue bonds are not a debt under the Texas Constitution and their validity has been sustained by the Texas Supreme Court. *City of Dayton v. Allred*, 123 Tex. 60. *Atkinson v. City of Dallas*, 353 S. W. 2d 275; *Writ of Cert. denied* 8 L. Ed. 2d 808; *Rehearing Denied*, 9 L. Ed. 2d 92.

Since the Texas Supreme Court has sustained the validity of the revenue bonds, no Federal question is presented. *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 50.

Petitioners further complain that they were denied the right to litigate the revenue bond issue of Love Field under *Title 15 U. S. C.*, Sec. 77q and *Title 15 U. S. C. Sec. 77v(a)* on the grounds of misrepresentation. Pleadings in the Federal Court case show that they attempted to litigate them as taxpayers and property owners. However, these Statutes are for the benefit of a good-faith purchaser of the bonds and not for a taxpayer. *Texas Continental Life Ins. Co. v. Bakers Bond Co.*, 187 F. Sup. 14, and *Birnbaum v. Newport Steel Corp.*, 193 F. 2d 461.

II.

**The Action of the Texas Supreme Court was wholly
within its Constitutional and Statutory
Jurisdiction.**

The Texas Supreme Court had ample constitutional and statutory authority to grant the writ of mandamus in which it ordered the Court of Civil Appeals to enforce the judgment in the case of *Atkinson v. City of Dallas*. It was so held in *G.C. & S.F. Ry. Co. v. Muse*, 109 Tex. 352, where the Supreme Court construed its jurisdiction, both appellate and original, as follows:

"Section 3 of article 5 of the Constitution authorized the Legislature to 'confer original jurisdiction on the Supreme Court, to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the state.' Under that authority the Legislature has conferred on this court original jurisdiction to issue writs of mandamus, 'agreeable to the principles of law, regulating such writs against any district judge or Court of Civil Appeals or judge of the Court of Civil Appeals, or officer of the state government, except the Governor of the state.' Vernon's Ann. Civ. St. Supp. 1918, art. 1526, Rev. St.

"It is inconceivable, in view of the express language of this article and the respective jurisdictions of the Supreme Court and of the Courts of Civil Appeals, that it was ever intended by the Legislature that this court should be precluded from granting full relief to one whom it found entitled to the writ of mandamus, under the law governing that writ, by reason of a contrary opinion of the Court of Civil Appeals. While the acts of those courts, under the authority conferred by article 1595 are entitled to, and will always receive, our utmost consideration, they cannot control the exercise of this

court's original jurisdiction; and, of course, when a judgment is pronounced in the exercise of that jurisdiction, all writs necessary for its enforcement may be issued. *Pickle v. McCall*, 86 Tex. 212, 24 S. W. 265; *Hovey v. Shepherd*, 105 Tex. 237, 147, S. W. 224."

The judgment of the Court of Civil Appeals in declining to grant the writ of prohibition in the case of *City of Dallas v. Brown et al.*, 362 S. W. 2d 372, although not reviewable by the Supreme Court by appeal was not final, but was subject to review by the Supreme Court of Texas in an original mandamus proceedings. *Dallas Ry. & Terminal Co. v. Watkins*, 126 Tex. 116.

Furthermore, the Supreme Court of Texas, under the Constitution and the statutes, has the power and authority to direct the Court of Civil Appeals to set aside and vacate its orders and perform the acts directed by the Supreme Court. *Cleveland v. Ward*, 116 Tex. 1. In spite of these decisions and the settled law on this question, Petitioners insist that the Supreme Court lacks this power and authority. Such misconception was the reason why Petitioners and their attorney were found guilty of contempt.

III.

The Texas Court of Civil Appeals had full jurisdiction over the parties in the Contempt Proceedings and any Irregularities were waived.

The Petitioners in their questions presented complain of what they term irregularities in the Contempt Proceedings. However, the record shows that all parties had notice of the

injunction and writ of prohibition mailed to them. Subsequent to this mailing, they held a meeting in which their attorney Donovan advised them as to their rights under this order and told them that they did not have to obey it. (S. F. 211-212.) Later the Court issued a show cause order and this order was personally served on all of the Petitioners including the Attorney Donovan, by the Deputy Sheriff of the County. Attorney Donovan appeared in Court representing all the parties, listed their names and asked for a continuance of the hearing. He was granted a delay of seven days. At the time of the hearing, the Court called the roll and checked each and every person to see that he was present either in person or by attorney (S. F. p. 15 et seq.) On advice of their Attorney Donovan, all of the parties refused to take the stand and show cause why they should not be held in contempt. (S. F. p. 199.) Only Attorney Donovan took the stand in their behalf and stated that their actions had been on his advice, that he told them to disregard the injunctive orders of the Court of Civil Appeals, and that they with knowledge then proceeded in the Federal Courts. (S. F. pp. 207-210.) Under the adjudicated cases, if there was any defect in the notice to show cause or service thereof, the above proceeding constitutes an effective waiver.

Even if no writ were served upon the Petitioners or if no writ were even issued, so long as the Court's pronouncement was brought to their knowledge and they answer it was sufficient. *Ex parte Stone*, 72 S.W. 1000.

The service of any formal summons is waived if the party appears in court and announces ready. *Ex parte Haubelt*, 57 Tex. Cr. R. 512.

If the parties show by their evidence that they understand what the injunction or writ means and what it prohibits them from doing, it is of no importance that it does not conform to the statute. *Ex parte Young*, 103 Tex. 470; *Ex parte Testard*, 102 Tex. 287.

IV.

A State Court having acquired jurisdiction of the parties may enjoin them from prosecuting a suit in the Federal Court involving the same Subject Matter.

A state court having acquired jurisdiction of the parties and the subject matter of the litigation, has the authority to enjoin the attorney and parties to the state court proceedings, from subsequently instituting or prosecuting a suit in the Federal Court involving the same subject matter. *Princess Lida v. Thompson*, 305 U. S. 456, 59 S. Ct. 275, 83 L. Ed. 285; *Blanchard v. Commonwealth Oil Co.*, 294 F. 2d 834, headnote 11; *Moton v. Hull*, 77 Tex. 80. It is academic that a state court will not enjoin a Federal Court in proceeding with a case over which the state court has acquired prior jurisdiction. However, there is a vast difference between an attempt of the state court to enjoin the Federal Court from proceeding with the trial of a case as opposed to the state court enjoining the litigants from proceeding with the prosecution of the suit.

V.

A Federal District Court may dismiss an appeal from its action upon motion of the Appellants before the appeal has been docketed.

So long as an appeal has not been docketed on the docket of the Circuit Court of Appeals, the District Court may dismiss the appeal upon motion of the Appellants. Rule 73(a), Federal Rules of Civil Procedure; *United States v. Mass. Bonding & Ins. Co.*, 303 F. 2d 823, headnote 6.

CONCLUSION

The decision of the Supreme Court of Texas in *City of Dallas v. Dixon et al* (365 S. W. 2d 919); the Per Curiam Opinion of the Court of Civil Appeals (368 S. W. 2d 240) and the judgments of dismissal by the United States District Judge in the cause styled *Brown et al v. City of Dallas*, and *Donovan et al v. Texas Supreme Court*, are in all respects correct, and upon those opinions and for the foregoing reasons the Petition for Certiorari in this case should be denied.

Respectfully submitted,

H. P. KUCERA,
501 City Hall,
Dallas 1, Texas,

Attorney for City of Dallas.

APPENDIX

Art. 5, Section 3, Texas Constitution, provides as follows:

"§ 3. Jurisdiction of Supreme Court; writs; sessions; clerk

"Sec. 3. The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the Judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law of where a statute of the State is held void. The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.

"The Supreme Court shall also have power, upon affidavit or otherwise as by the court may be determined, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction."

Art. 1826, Vernon's Ann. Civ. Stats of Texas, grants power to Courts of Civil Appeals to punish for contempt as follows:

"Art. 1826. 1594, 999 May punish for contempt

"They may punish any person for a contempt of said courts, not to exceed one thousand dollars fine or imprisonment not exceeding twenty days."

Art. 701, Revised Civil Statutes of Texas, provides as follows:

"Art. 701. [605] Shall hold election

"The bonds of a county or an incorporated city or town shall never be issued for any purpose unless a proposition for the issuance of such bonds shall have been first submitted to the qualified voters who are property tax payers of such county, city or town."

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No. 264

In the

Supreme Court of the United States
OCTOBER TERM 1963

JAMES P. DONOVAN, et al.,

Petitioners,

v.

CITY OF DALLAS, et al.,

Respondents.

*Application for Writ of Certiorari to the Supreme Court of
Civil Appeals, 5th Supreme Judicial District of Texas,
and the United States District Court, Northern
District of Texas*

PETITIONERS' BRIEF ON THE MERITS

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No. 264

In the
Supreme Court of the United States
OCTOBER TERM 1963

JAMES P. DONOVAN, et al.,

Petitioners,

v.

CITY OF DALLAS, et al.,

Respondents.

PETITIONERS' BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Supreme Court of Texas in *City of Dallas et al. v. Dixon et al.* (R. 276-286) is reported in 365 SW 2d 919.

The opinion of the Court of Civil Appeals, 5th Supreme Judicial District of Texas in *City of Dallas et al. v. Brown et al.* (R. 10-18) is reported in 362 SW 2d 372.

The opinion of the Court of Civil Appeals, 5th Supreme Judicial District of Texas in the Contempt Proceeding, ancillary to *City of Dallas et al. v. Brown et al.* is reported in 368 SW 2d 240.

The oral opinion of the United States District Court, Northern District of Texas in *Brown et al. v. City of Dallas et al.* is unreported, but is set out in the Record herein at page 306.

The oral opinion of the United States District Court, Northern District of Texas in *Donovan v. Supreme Court of Texas* is unreported, but is set out in the Record herein at pages 347-353.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1257, to review the following Judgments entered in violation of Articles III and IV, and Amendments V and XIV of the Constitution of the United States and applicable Federal Statutes:

Judgment of the Supreme Court of Texas entered in *City of Dallas et al v. Dixon*, March 13, 1963 (R. 58), Motion for Rehearing Denied April 10, 1963. (R. 78)

Judgment of Contempt entered by the Court of Civil Appeals, 5th Supreme Judicial District of Texas, in *City of Dallas et al. v. Brown et al.*, May 22, 1963. (R. 248)

Jurisdiction of this Court is invoked under Title 28 U.S.C. §1651, to review the Judgments of the United States District Court, Northern District of Texas, entered in *Brown et al. v. City of Dallas et al.*, May 9, 1963, (R. 307) and June 14, 1963;-(R. 315); and the Judgment entered by said United States District Court in *Donovan et al. v. Supreme Court of Texas et al.*, on June 21, 1963 (R. 353)

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following provisions of the United States Constitution which are found in the U.S.C. Const. Art. 1 at the page indicated: Article III, §1 and 2, page 43; Article IV, §2, page 43; Amendment V, page 47; and Amendment XIV, Section 1, page 49.

Relevant Federal Statutes include the following Sections of the United States Code: Title 42, Sections 1971, 1981, 1983, 1985(2), pp. 67, 71, 85 and 142; Title 15 U.S.C. Sections 77q and 77v, pp. 91, 152; Title 28, Sections 1331, 1343, 1651 and 2283, pp. 92, 202, 2, and 49; Federal Rules of Civil Procedure, Rules 12, 56; 28 U.S.C.A. pp. 20, 56.

The provisions of the Texas Constitution, Statutes and Rules of Civil Procedure, involved in this case, include: Texas Constitution, Article 1, Section 3; Article 1, Section 19; Article 5, Section 3; (Vernon's Texas Constitution, Volume 1, pp. 1, 3, 6, 45.) Texas Revised Civil Statutes: Article 46d-9 (Vol. 1 V.T.C.S. p. 198); Article 701 (Vol. 2 V.T.C.S. p. 186); Article 1733 (Vol. 3B V.T.C.S. p. 285); Texas Rules of Civil Procedure, Rule 394 (V.A.T.R.C.P. p. 198), Rule 483 (Id. p. 440).

The relevant portions of the cited provisions are set forth verbatim in the Appendix hereto.

QUESTIONS PRESENTED

1. May the Supreme Court of Texas, *acting without appellate jurisdiction*, mandamus the reversal of the Judgment

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of another State Court, directing the trial court to prohibit Petitioners from further prosecuting a pending Federal Court action; thereby usurping the Judicial Power vested in the United States Courts by the Constitution and Statutes of the United States?

2. May the Supreme Court of Texas usurp the Judicial Power of the United States District Court to determine a plea of res judicata, pleaded in a pending Federal Court action?
3. May the Supreme Court of Texas exercise jurisdiction, not granted by the Texas Constitution and Statutes, to prevent further prosecution of a pending Federal Court action?
4. May the Texas Court of Civil Appeals, *without notice to parties to a final Judgment*, reverse that Judgment denying a Writ of Prohibition, and issue such a Writ to prohibit Petitioners from prosecuting a pending suit in Federal Court?
5. May the Texas Court of Civil Appeals, *without issuance of legal process or service thereof according to law*, fine 85 citizens \$17,400 for attempting to prosecute their rights under Federal Law in a pending Federal Court action; and were such fines excessive and unconstitutional?
6. May the Texas Court of Civil Appeals fine the Petitioners and sentence their lawyer to jail, for filing an injunction action in Federal Court seeking restraint of State Courts' interference with their pending Federal action, when no prohibition existed against such injunction suit?

7. May the United States District Court *abandon its jurisdiction*, by substituting for its judgment the judgment of a State Court, to dismiss a pending Federal suit, and aid in the enforcement of a State Court Order, *illegally entered*, by dismissing Petitioners' Appeal to the Court of Appeals, Fifth Circuit, upon Petitioners' request filed under State Court threats of fine and imprisonment?
8. May Petitioners be convicted of contempt after a hearing in which no legal proof of the existence of a valid court order, under which Petitioners were cited to show cause as to why they should not be punished for contempt, was offered, and in which no proof of the legal service of such order was tendered?

STATEMENT OF THE CASE

On June 23, 1961 in a cause entitled: *George S. Atkinson et al., v. City of Dallas*, hereinafter referred to as the *Atkinson* case, forty-six Dallas citizens, including sixteen of the Petitioners herein, filed their First Amended Original Petition (R. 20) therein seeking injunctive relief against one Defendant, the City of Dallas. That Defendant answered said Amended Petition (R. 20) and moved for Summary Judgment, its Motion being granted on July 17, 1961. The Judgment was affirmed by the Respondent Court of Civil Appeals, opinion reported in 353 S.W. 2d 275; the Respondent Supreme Court of Texas refused Plaintiffs' application for Writ of Error, N.R.E., and this Court denied Certiorari June 25, 1962. (8 L. Ed. 808) Rehearing was refused on October 8, 1962.

Plaintiffs in the *Atkinson* case sued individually and as representatives of Class defined as: "the home owners, families and individuals who live, work, reside and attend schools, churches and other community centers in the area embraced within the approach areas of planned runway 13R/31L;" the "planned runway" mentioned had reference to construction of a proposed new runway at Love Field, a Municipal Airport owned by the Defendant City of Dallas, Texas. (R. 22)

The relief prayed for in the *Atkinson* case was an injunction against: Defendant's construction of the proposed runway; Defendant's issuance of municipal bonds, other than those authorized by the Constitution of the State of Texas; Defendant's lending of public credit or funds in aid of private persons; Defendant's issuance of bonds without approval by vote of qualified taxpayers; and Defendant's submission to voters approval, any new or additional bonds the issuance of which would increase the City's indebtedness beyond the statutory limits. (R. 35, 36) The grounds upon which the prayer for relief was based were: threatened seizure of Plaintiffs' air rights without first making compensation therefor; irreparable damage to Plaintiffs through operation of jet aircraft over their property; ultra vires activity of the City contrary to Federal Regulations and Standards of safety; creation of a public nuisance through use of the proposed runway; arbitrary and capricious action contrary to public interest; and *proposed* financing of the project by a *proposed* illegal issue of bonds. (R. 22-35)

After Certiorari was denied in the *Atkinson* case, and on September 24, 1962, one hundred twenty Dallas citizens, including only twenty-seven of the *Atkinson* Plaintiffs joined by twenty-two of their wives and seventy-one persons, not parties to the *Atkinson* case, filed a Complaint in the United States District Court, Northern District of Texas in an action entitled: "*Daniel C. Brown et al., v. City of Dallas et al.*," hereinafter referred to as the "Brown" case; (R. 255-263) The Plaintiffs sued individually, and did *not* claim representation of any Class.

The Parties Defendant in the *Brown* case were: the City of Dallas, the Attorney General of the State of Texas, nine members of the Dallas City Council, the City Manager, City Auditor, City Secretary, City Attorney and City Airport Director, two security dealers, a firm of bond attorneys, and five individuals sued individually and *as representatives of the Class*, consisting of holders of the outstanding bonds under attack. (R. 256-258)

The prayer in the *Brown* case was for an injunction against the payment of *outstanding* City of Dallas Airport Revenue Bonds, identified by Series number, or any other Airport Revenue Bonds issued without approval at a taxpayers' election; an injunction against construction of a parallel instrument runway within the existing limits of Love Field; an injunction against circulation by the Defendants of false information to induce purchase of Airport Revenue Bond Series 401, (R. 262); and Judgment declaring the *outstanding* Airport Revenue Bonds void. (R. 263) The *Brown* case prayer for relief was predicated upon the following

grounds: deprivation of Plaintiffs' Civil Rights guaranteed by the United States Constitution, and United States Statutes, Title 42, Sections 1971, 1981, 1983 and 1985, under color of law, through denial of the taxpayers election provided for by Article 46d-9 of the Revised Civil Statutes of Texas; construction of an airport runway in violation of United States Statutes and Regulations adopted pursuant thereto, resulting in the burdening of interstate commerce in violation of Article 1, Section 8 of the United States Constitution; and violation by the Defendants of Federal Statutes prohibiting use of the mails to defraud and the Securities Exchange Act banning the circulation of false and fraudulent statements to induce the sale of bonds. (R. 258-262)

Issue was joined in the *Brown* case, September 25, 1962, and a Motion to dismiss and Answer were filed October 12, 1962, during the pendency of the *Prohibition* case hereinafter summarized. (R. 267) That pleading contained pleas of: lack of jurisdiction, no showing of violation of Civil Rights, *res judicata by reason of the Atkinson case*, (R. 267-270) and certain specific admissions and denials. (R. 270-273) Plaintiffs' Motion to the United States District Court for an injunction against the State Courts' interference with the *Brown* action was denied October 10, 1962. (R. 6) On April 24, 1963, Defendants filed a supplemental Motion to Dismiss the *Brown* case, pleading the action taken in the *Mandamus* and *Prohibition* cases, hereinafter described, by the Respondent Courts. (R. 274) Plaintiffs answered and moved for a continuance and treatment of the Motion as a

Motion for Summary Judgment, as provided in Rule 12 of the Federal Rules of Procedure. (R. 290, 291). That Motion was denied. (R. 310) After hearing the Motions to Dismiss the United States District Judge stated: "You and the litigants in this case have been prohibited from proceeding in this case and therefore I dismiss the case as asked by the City Attorney's office." (R. 306) Prior to this hearing the Court orally approved withdrawal and addition of Parties Plaintiff, reducing said approval to writing by Order entered May 9, 1963. (R. 308, 309). The new Plaintiffs permitted to intervene had not been parties to the *Atkinson* case.

On May 15, 1963 the *Brown* case Plaintiffs perfected an appeal to the United States Court of Appeals, Fifth Circuit. (R. 311, 313) On June 11, 1963, *acting under duress of threatened additional fines and imprisonment* (R. 314, 315) the Appellants moved to dismiss the Appeal, which Motion was granted June 14, 1963. (R. 315; 316)

While the *Brown* case was pending in the United States District Court, on October 6, 1962, the City of Dallas, joined by the other 23 Defendants in the *Brown* case, who were *not* parties to the *Atkinson* case, filed a Petition for Writ of Prohibition and Ancillary Orders under the style of "City of Dallas et al., v. Daniel C. Brown et al." which action will be referred to herein as the "Prohibition" case. The Respondents named therein were the Plaintiffs in the *Brown* case, ninety-three of whom had not been parties to the *Atkinson* case. (R. 10, 20, 255). The United States District Judge was *not* a party to the Prohibition proceeding. (Id.) The Petition sought a Writ prohibiting further prose-

cution of the *Brown* case by the Respondents. Issue was joined by Respondents, and after a full and complete hearing, the Respondent Court of Civil Appeals denied the Petition for Writ of Prohibition stating that the pendency of the *Brown* case in Federal Court "does not invade our exclusive jurisdiction, though the issue in the suit may be the same as the issues decided in our judgment (*Atkinson* case) of affirmance. Ours is not the only Court which has jurisdiction to enfore a plea of res judicata in support of our judgment of affirmance of December 15, 1961. That defense may be and has been pled by the City in Action 9276 in the United States District Court, (*Brown* case) and that Court has jurisdiction to hear and give effect to the plea." (R. 12, 13) One Justice dissented (R. 16), but Judgment, denying the Writ of Prohibition, was entered October 24, 1962 and Motion for Rehearing overruled November 23, 1962. (R. 19) This Judgment became final upon denial of the Motion for Rehearing and was not reviewable by the Supreme Court of Texas by appeal or writ of error. (R. 277)

Without notice to Respondents in the *Prohibition* case, Chief Justice Dixon of the Respondent Court of Civil Appeals purported to reverse this Judgment by alleged order of April 16, 1963. (R. 80)

Denied relief in the *Prohibition* case, the Petitioners there-in filed a Petition for Writ of Mandamus with the Supreme Court of Texas, styled "City of Dallas et al., v. Honorable Dick Dixon et al.", herein referred to as the "*Mandamus*" case. The parties were the same as in the *Prohibition* case, except for the addition of the Justices of the Respondent

Court of Civil Appeals. The Petition recited the City's version of the *Atkinson* case, the *Brown* case and the *Prohibition* case (R. 2-7) and prayed for a Mandamus to the Respondent Court of Civil Appeals directing it to grant the relief prayed for in the *Prohibition* case: a Writ of Prohibition against the Plaintiffs in the *Brown* case pending in the United States District Court, and those similarly situated as Plaintiffs, together with such Ancillary Mandatory Orders as may be necessary to give full force and effect to the Judgment rendered by the Respondent Court of Civil Appeals in the *Atkinson* case, and to further refrain from further litigating the matter in any Court. (R. 7) Respondents in the *Mandamus* action answered making affirmative denials of fact allegations in the Petition, questioning the Court's jurisdiction and raising issues of denial of Respondents' rights under the Constitution and laws of the United States. (R. 54-58) The Supreme Court of Texas rendered an opinion (R. 276-286) stating that the Writ would issue unless the Respondent Court of Civil Appeals conformed to the dictates of the opinion, and entered a Judgment entitled "Original Mandamus" on March 13, 1963. (R. 288, 289) Motion for Rehearing was denied April 10, 1963 (R. 287) The Court's Judgment taxed costs *only* against the Plaintiffs in the *Atkinson* case, although seventeen of those persons were *not* parties to either the *Prohibition* or the *Mandamus* cases.

On April 16, 1963, *without notice* to the Respondents or an appearance in their behalf, Chief Justice Dixon, purporting to act in the *Prohibition* case, signed an Order en-

titled "Writ of Prohibition and Ancillary Orders". (R. 78-82). This Order purported to reverse the Judgment of October 24, 1962, but it did not bear either the seal of the Court or the signature of the Clerk. (R. 203) No personal service of this Order was made on either the Respondents in the Prohibition action or their Attorney of Record; copies were allegedly mailed to the parties involved. (R. 201, 202, 244) The alleged Writ of Prohibition prohibited James P. Donovan, individually and as attorney, and any other agents, attorneys or representatives, of the Respondents in the *Prohibition* case, and those Respondents each and every one, individually and *as a class of taxpayers* and residents and landowners in the vicinity of Love Field, together with all other persons similarly situated from "prosecuting, urging or in any manner seeking to litigate, as Attorney and/or plaintiffs" the *Brown* case pending in Federal Court, and "from filing or instituting any litigation, lawsuits or other actions seeking to contest the right of the City of Dallas to proceed with the construction of the parallel runway as presently proposed at Love Field situated within the City of Dallas, Texas, or from instituting and prosecuting any further litigation, lawsuits or actions in any court, the purpose of which is to contest the validity of the airport bonds *heretofore* issued under authority of Article 1269j, V.A.C.S. or *that might be issued* under said Article for the construction of the Love Field runway and the ancillary improvements in connection therewith, or from in any manner interfering with, or casting any cloud upon, or slandering the title of, or interfering with the delivery of, the proposed

bonds by the City of Dallas, any of its agents or representatives or others seeking to assist in the sale and delivery of the same". (R. 80; 81) Respondents were further prohibited individually, and as a class, "and others in the same class" from in any manner interfering with the enforcement and execution of the judgment in the *Atkinson* case. (R. 81) The Judge then included three paragraphs calculated to avoid the statutory requirements of Rule 394, Texas, Rules of Civil Procedure as to process and service thereof.

On April 23, 1963, eight of the Plaintiffs in the *Brown* case, joined by their Attorney, filed an action in the United States District Court, Northern District of Texas, entitled "James P. Donovan et al., v. Supreme Court of Texas et al.", herein referred to as the "*Injunction*" case. The Defendants in that case were the Respondent Court of Civil Appeals, the Supreme Court of Texas and the Justices of those Courts. (R. 316-324) This Complaint alleged the action in the *Prohibition* and *Mandamus* cases and prayed for a restraining order, a temporary and permanent injunction against the Respondent State Courts' taking any further action interfering with or tending to interfere with Plaintiffs' prosecution of their *Brown* case in Federal Court. (R. 322, 323) The Attorney General for the State of Texas appeared for the Courts and Justices thereof on May 8, 1963 and filed a Motion to Dismiss and an Answer. (R. 324-326). Prior to the hearing of his Motion to Dismiss the Court approved the withdrawal of thirty-one Plaintiffs and the addition of seven new ones; an Order

was entered thereon May 9, 1963. (R. 331) The *Injunction* case was dismissed by the Federal Court as Moot (R. 352) May 16, 1963 and an Order entered thereon June 21, 1963. (R. 353)

On May 7, 1963 the City of Dallas filed a Motion for Contempt in the *Prohibition* case before the Respondent Court of Civil Appeals (R. 82-90) asking that the Court punish all Plaintiffs in the *Brown* and *Injunction* cases, the two Federal Court actions for violation of the alleged Writ of Prohibition. Included were the seven Plaintiffs added after the supposed issuance and service of the Writ. Orders to Show Cause (R. 241) were issued and served which were identical except as to the number of Contempt Charges included and the Identity of the Respondent. The violations charged in these Orders were distributed into three classes, (R. 109, 110): Class 1 was charged with (A) failing to request dismissal of the *Brown* case; (B) contesting the dismissal of said case; (C) taking exception to the Court's Order of Dismissal; (D) filing the *Injunction* case against the Respondent Courts in Federal Court; Class 2 was charged only with (D) filing the *Injunction* suit in Federal Court; and Class 3, consisting of the seven added Plaintiffs in the *Brown* case, not parties to the *Prohibition* case, who were charged with contempt in joining as Plaintiffs in the Federal Court *Brown* case and contesting dismissal thereof. (R. 109, 110) (R. 177-179) Respondents filed a Motion to Quash and an Answer to the Charges of Contempt. (R. 109-117) The Motion to Quash was overruled. (R. 162) After hearing testimony of May 20, 1963

(R. 162-235) the hearing was adjourned to May 22, 1963, at which time the Court announced its decision (R. 235-240) and entered its Judgment holding Respondents in Contempt. (R. 248-254) Respondents' Motion for a stay of execution were denied; (R. 240) the Respondent Petitioner James P. Donovan was committed to the Dallas County Jail without bail, and confined until June 10, 1963; the other Respondents, Petitioners herein were compelled under threat of imprisonment to pay their fines and Court costs. Three days before the Attorney was released from jail, after applications for Writs of Habeas Corpus had been denied, the Respondent Court of Civil Appeals wrote an opinion in support of its Judgment of Contempt. (368 S.W. 2d 240)

No Review of the *Contempt* Judgment or the *Prohibition* Judgment was available under Texas Procedure.

The Petition for Writ of Certiorari to the Supreme Court of the State of Texas and the Court of Civil Appeals of the State of Texas Fifth Supreme Judicial District was granted by this Court October 21, 1963. (R. 354)

SUMMARY OF ARGUMENT

The Judicial Power of the United States is vested by the Constitution in the Federal Courts. The Respondent State Courts were without jurisdiction to prohibit the Petitioners from prosecution of the *Brown* and *Injunction* cases in the Federal forum to secure their rights arising under Federal law.

The State Courts lacked jurisdiction to determine the validity of the defense of res judicata interposed in the

Brown case, and such determination, being contrary to the evidence of record, constituted a denial to Petitioners of due process of law.

The United States District Court, vested with jurisdiction over the subject matter and the parties in the *Brown* and *Injunction* cases could not legally abandon that jurisdiction; neither could it accept judgments made by the State Courts as conclusive of the issues raised therein.

The Respondent Supreme Court of Texas is a Court of limited jurisdiction. It has no supervisory jurisdiction over the Respondent Court of Civil Appeals, and had no Appellate Jurisdiction over that Court relative to the Judgment denying Writ of Prohibition. By law it is limited to issuance of the writ of mandamus *only* agreeable to the principles of law regulating that writ. That Court's issuance of the Writ of Mandamus to dictate the manner in which the Court of Civil Appeals should exercise its discretion, predicated upon reversal of a final judgment and express findings of fact, was without the jurisdiction of the Supreme Court of Texas and void.

The actions of the Respondent State Courts in denying Petitioners the benefit of established principles of law constituted a denial of due process.

The actions of the Respondent Court of Civil Appeals taken under authority of the void order of the Supreme Court of Texas was wholly void; the action of the Respondent Court of Civil Appeals, taken in direct violation of statutory rules governing process was void.

The action of the Respondent Court of Civil Appeals in convicting the Petitioners of Contempt of a void court order was a denial of due process and equal protection of the law; the conviction of contempt for acts not expressly prohibited by the alleged court order violated, constitutes a denial of due process.

All judgments and orders entered by the State Courts subsequent to the Judgment of the Court of Civil Appeals, denying the Writ of Prohibition, were void for want of jurisdiction and should be reversed.

The Respondent Court of Civil Appeals should be ordered to reinstate the Judgment denying the Writ of Prohibition, and the United States District Court should be ordered to reverse its Judgment of Dismissal in the *Brown* and *Injunction* cases, reinstating the *Brown* case for trial on the merits, and granting the injunction prayed for in the *Injunction* case. This Court has authority to take such action under Title 28, Section 1651 of the United States Code.

ARGUMENT

POINT ONE

The Respondent State Courts lacked jurisdiction to prohibit Petitioners from prosecution of actions in the United States District Court.

The Constitution of the United States expressly provides: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art.

III, §1. It also states: "The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority;" Art. III, §2.

The Complaint filed in the *Brown* case in the United States District Court alleged: That this action arises under the 14th Amendment of the Constitution of the United States, Section 1; U.S.C. Title 42, Sections 1971, 1981, 1983, 1985; and U.S.C. Title 15, Section 77q; this Court has jurisdiction of this cause under U.S.C. Title 28, Sections 1331 and 1343, and U.S.C. Title 15, Section 77v." (R. 256) The Defendants in the case submitted to the jurisdiction of the District Court by filing on September 25, 1962 a Motion to Advance (R. 263) and a Motion to Dismiss and Answer on October 12, 1962. (R. 267) Though both pleadings set up a defense of res judicata, based on the *Atkinson* case, no hearing was requested and the Defendants sought a Writ of Prohibition from the Respondent State Courts to enjoin the prosecution of the Federal action. The United States District Court refused Plaintiffs' application to enjoin State Court interference, (R. 12) with their prosecution of their Federal suit. The Court of Civil Appeals denied Defendants' Petition for Writ of Prohibition, (R. 10) but subsequently issued such a Writ in compliance with the judgment and orders of the Supreme Court of Texas, (R. 78) and prohibited Petitioners from further prosecution of the *Brown* case then pending in Federal Court. The Brown Plaintiffs again asked the United States District Court to enjoin State Court interference with their Federal suit

through an Injunction action. (R. 316) Both Federal actions were dismissed by the United States District Court, on the theory that the Plaintiffs therein were bound by the State Court Prohibition Order which was a legal bar to further proceedings in Federal Court. (R. 306, 352.) For attempting to protect their rights in Federal Court the Petitioners were held in Contempt of the Respondent Court of Civil Appeals and punished by fine or imprisonment. (R. 248)

It has long been established that State Courts are without legal authority to enjoin proceedings in Federal Courts, once jurisdiction has attached. *U. S. v. Keokuk* 73 U.S. 514, 6 Wall 514, 18 L. Ed. 933; *Riggs v. Johnson County*, 6 Wall 166, 18 L. Ed. 768; *Weber v. Lee County*, 6 Wall 210, 18 L. Ed. 781.

The reason for the rule, and the law of this case is clearly set out in *Central National Bank v. Stevens*, 169 U. S. 432, 42 L. Ed. 807, where it is written at pages 439 and 817:

"It is a doctrine of law, too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment till reversed, is regarded as binding in every other court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. (Emphasis ours) These rules have their foundation, not merely in comity, but on necessity. For, if one may enjoin, the other may retort by injunction, and thus the parties be without a remedy;

being liable to process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of *Kennedy v. the Earl of Cassillio* (2 Swanst. 321) Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the court of sessions of Scotland, which on more mature reflection he dissolved; because it was admitted, if the court of chancery could in that way restrain proceedings in an independent foreign tribunal, the court of sessions might equally enjoin the parties from proceeding in Chancery, and thus they would be unable to proceed in either court. *The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is litigant in another and independent forum.* (Emphasis ours) *Peck v. Jeness*, per Mr. Justice Grier, 48 U.S., 7, How. 612, 624, 12 L. Ed. 841, 848.

"State Courts are exempt from all interference by the Federal Tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit courts and state courts act separately and independently of each other, and in their respective spheres of action the process issued by the one is as far beyond the reach of the other as if the line of division between them were traced by landmarks and monuments visible to the eye. Appellate relations exist in a class of cases between the state courts and this court, but there are no such relations between the state courts and the circuit courts. Viewed in any light, therefore, it is obvious that the injunction of a state court is inoperative to control, or in any manner to affect the process or proceedings of a circuit court, not on account of any paramount jurisdiction in the latter courts, but because in their sphere of action circuit

courts are wholly independent of state tribunals. *Riggs v. Johnson County* (United States, *Riggs v. Johnson Supers.*) 73 U.S. 6 Wall. 166."

Whether due effect has been given by a state court to a judgment or decree of a court of the United States is a Federal question within the jurisdiction of this court on a Writ of Error to the Supreme Court of the State. *Crescent City Live Stock L. & S.H. Company v. Butchers Union Slaughter House & L. & S.H. Company*, 120 U.S. 141.

The exemption of the authority of the courts of the United States from interference by legislative or judicial action of the states is essential to their independence and efficiency. *Freeman v. Howe*, 65 U.S. 24 How. 450; *Buck v. Colbath*, 70 U.S. 3 Wall 334; *Rio Grande RR. Co. v. Gomila (Rio Grande R. Co. v. Vinet)* 132 U.S. 478.

In Story's *Equity Jurisprudence*, Vol. 2, §900, it is said, referring to the power sometimes exercised by Courts of Equity, to restrain parties within their jurisdiction from proceeding in foreign courts: "There is one exception to this doctrine that has long been recognized in America, and that is that the State Courts, cannot enjoin proceedings in the Courts of the United States, nor the latter in the former courts."

While Congress has, since the delivery of the foregoing opinion granted certain rights of injunction to the Federal Courts, no such rights have been created in the State Courts.

Limited injunctive powers in State Courts to protect their jurisdiction in *in rem* actions has been recognized by the Federal Courts. *Princess Lida v. Thompson*, 305 U.S. 456,

59 S. Ct. 275, 83 L. Ed. 285; *Blanchard v. Commonwealth Oil Co.*, 294 Fed. 2d 834. However, the *Princess Lida* case recognizes this distinction between *in rem* and *in personam* actions and the rules applicable thereto by quoting from *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 195; 79 L. Ed. 850, 855: " * * * if both courts were to proceed they would be required to cover the same ground. This of itself is not conclusive of the question of the District Court's jurisdiction, for it is settled that where the judgment is strictly *in personam*, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other."

The *Blanchard* case, *supra*, cited *B & O RR. Co. v. Kepner*, 314 U.S. 44, 51-52 quoting: "We have therefore for decision in this case the question whether a state court may validly exercise its equitable jurisdiction to enjoin a resident of the State from prosecuting a cause of action arising under the Federal Employees Liability Act in a Federal Court of another state where that act governs venue, on the ground that the prosecution in the federal court is inequitable, vexatious and harassing to the carrier." * * * under such circumstances petitioner asserts power, abstractly speaking in the Ohio Court to prevent a resident under its jurisdiction from doing inequity. * * * It is clear that the allowance or denial of this federal privilege is a matter of federal law not a matter of state law. Its correct decision depends upon a construction of a

federal act. Consequently the action of a state court must be in accord with the federal statutes and the federal rule as to its application rather than state rule or policy." * * * "It is obvious that no state statute could vary the venue and we think equally true that *no state court* may interfere with the privilege, for the benefit of the carrier, or the national transportation system, on the ground of inequity based on cost, inconvenience or harrassment."

It is submitted that the foregoing citations establish the proposition that a State Court is without jurisdiction to issue an injunction or Writ of Prohibition to control, or in any manner affect the action, the process, or the proceeding of a United States District Court where that Court has jurisdiction of the subject matter and the parties. Were the rule otherwise, State Courts could easily usurp jurisdiction and limit their citizens to the local forum by, as in the instant case, making a finding of res judicata binding on a class. For example in the civil rights field, there is hardly a State in the South where actions of a class nature have not been brought in State Courts. If the action of the State Courts in this matter is legal, there is nothing to prevent the State Courts from holding that those decisions are res judicata of the negroes' right to vote and their right to integration, and binding on the Class, the negroes. Having made such a holding, the State Courts could then enjoin all negroes from seeking relief in the Federal Courts, and thus deprive them of their right to an adjudication in the federal forum under federal law. Such a position is untenable.

POINT TWO

The United States District Court, having jurisdiction of the subject matter and parties to a cause, is obligated to exercise that jurisdiction, defend it and decide it on the basis of Federal Law.

The obligation of the United States Courts to exercise jurisdiction in those matters delegated to them by the Constitution and Laws of the United States was considered in *Willcox v. Consolidated Gas Co.*, 212 U.S. 19; 29 S. Ct. 192; 3 L. Ed. 382, pp. 40, 209, 394 where it is written:

"They assume to criticize the court for taking jurisdiction of this case as precipitate, as if it were a question of discretion or comity, whether or not that court should have heard the case. On the contrary, there was no discretion or comity about it. When a Federal Court is properly appealed to in a case in which it has by law jurisdiction, it is its duty to take jurisdiction. (*Cohen v. Virginia* 6 Wheat 264, 404; 5 L. Ed. 257, 291) and in taking it, that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which, by law brings the case within the jurisdiction of a Federal Court. *The right of a party plaintiff to choose a Federal court, where there is a choice, cannot be properly denied.*" (Emphasis ours)

Title 28 U.S.C. 1651 (App. A-4) authorizes all United States Courts to issue all writs necessary in aid of their respective jurisdictions. To clarify the rule propounded by the Courts, Section 2283 of Title 28 was amended to grant the Federal Courts power to grant an injunction to stay proceedings in State Courts. (App. A-4) These statutes

have been applied in numerous cases consistently with the rule of law as stated in *Kansas City Gas Co. v. Kansas City*, 198 Fed. 500. "The rule is well settled that where the jurisdiction of a court of the United States has attached, the right of the plaintiff to prosecute his suit in such court to a final determination there cannot be arrested, defeated or impaired by any subsequent action or proceeding of the defendant respecting the same subject matter in a state court."

The elements essential to the application of this rule of law existed in the instant case. The Complaints in the *Brown* case and the *Injunction* case alleged causes of action within the jurisdiction of the United States District Court; (R. 255-263; 316-323) the Defendants in both cases appeared and answered: (R. 263-273; 327-330) In the *Brown* case the Defendants raised the issue of res judicata both as a basis of Motion to Dismiss and by way of defense. (R. 263-273) They then abandoned the Federal forum and applied to the State Courts for Judgment on this issue. The Plaintiffs in those cases invoked the jurisdiction of the United States District Court to protect them against the State Courts' interference by timely application for an injunction, filed in the *Brown* case (R. 6) and by the filing of the *Injunction* case. The District Court abandoned its jurisdiction, subjugated its Judgment to that of the State Courts and refused to exercise its own judgment on the pleaded issue of res judicata. (R. 306, 352)

As a result of this failure of the United States District Court to protect the Petitioners' rights to trial of their cause

in the Federal forum, Petitioners were placed in the position anticipated in *Central National Bank v. Stevens, supra*. They were forced to elect between the abandonment of their rights under law, and the risk of punishment for contempt. The result of their election brought the punishment for contempt, left them without a valid determination of their rights by a Federal Court, and under the duress of threat of additional fines and imprisonment compelled them to abandon their appeal from the adverse decision of the Federal Court. (R. 314, 315) In this situation the rights claimed by Petitioners in the *Brown* case under the Constitution and Statutes of the United States have been forever denied without a legal hearing, unless this Court reverse the action of the United States District and Respondent State Courts.

POINT THREE

The record demonstrates that the Atkinson Judgment was not *res judicata* of the issues raised in the *Brown* Case.

In consideration of the question of whether the judgment in the *Atkinson* case was *res judicata* of the issues raised in the *Brown* case, it must be remembered that under Federal Rules of pleading Plaintiffs are not required to plead evidence. The Summary Judgment was entered in the *Atkinson* case on *July 17, 1961* (R. 3) The pleadings upon which such Judgment was granted consisted of Plaintiffs' First Amended Original Petition (R. 20-36) and Defendants Motion to Dismiss and Answer to Plaintiffs' First Amended Original Peti-

tion. (R. 37-53) Those pleadings show that there were 46 Plaintiffs suing one (1) Defendant, the City of Dallas; they also show that the *only* Federal question raised was: "That the Defendant City of Dallas has made no provision for the acquisition of Plaintiffs' air rights either by purchase or condemnation and proposes to take and seize such rights for an alleged public use without compensating Plaintiffs therefor, all in violation of the provisions of the Constitution of the United States of America, Amendments V and XIV, * * *" (R. 8) The Regulations of the Federal Aviation Agency were alleged to sustain Plaintiffs contention that the proposed construction was illegal under Texas Statute Article 46-7B (R. 24-27) An injunction was sought against a *proposed* issue of airport revenue bonds in violation of State Statutes and the Charter of the City of Dallas. (R. 16, 17) The prayer for relief was for an injunction against construction of the parallel runway, and the *future issuance* of bonds not authorized by the Constitution of the State of Texas and not approved by a taxpayers' election. These pleadings demonstrate that no *outstanding* bonds were under attack, *nor could they have been because of the lack of holders of outstanding bonds as parties Defendant.*

The Summary Judgment in the Atkinson case was appealed to the Respondent Court of Civil Appeals which affirmed with an opinion reported in 353 S.W. 2d 275. In that opinion the Court stated at page 279: "In their eighth and tenth points appellants assert that the court erred in holding that the *proposed* issue of bonds was legal, * * * ". It then went on to support its position by citing *City of Corpus Christi*

ex rel. Harris v. Flato and *Womack v. City of West University Place* (p. 279). The *Womack* case 32 S.W. 2d 930, 931 held Plaintiffs could not enjoin the issuance of bonds because: "Appellants allege in their petition that the bonds were issued without authority of law and void, pleading nine reasons for their being void, for which reasons they say the bonds could not be collected. If the facts stated in the petition are true, the acts which it is the purpose of this suit to prevent could not fix a liability against the city, and the bonds would be void in the hands of every person who might become their holders, for there would not be a semblance of authority for their issuance, and in no event could the bonds injuriously affect the rights of appellants. *Polly v. Hopkins*, 74 Tex. 145, 11 S.W. 1084." The cited *Polly* case held at page 1085: "The ground on which injunctions at the suit of taxpayers, are granted to restrain a municipal corporation from issuing bonds, is that the issuance will be illegal, but under such circumstances as to make the bonds binding on the corporation if they go into the hands of innocent holders, and thus render taxation necessary to raise funds to discharge them." These cases have been frequently cited in Texas to sustain the proposition that taxpayers are not allowed to enjoin a *proposed* issue of bonds because of lack of a justiciable interest.

In the *Harris v. Flato* case, 83 S.W. 2d 433, the Court also held that the taxpayer lacked the justiciable interest necessary to maintain the suit. This was confirmed in *Hayward v. City of Corpus Christi* where the *Flato* judgment was pleaded in bar by the bondholders seeking to collect from the city.

The Court said in 195 S.W. 2d 995, 1002: "We are in full accord with the holding of the San Antonio Court of Civil Appeals in the *Flato* case to the effect that Harris did not have the authority to maintain that suit, either in his own name or in the name of the city upon his relation as a taxpayer." The bond issue attacked in the *Flato* case was subsequently held void for want of an election by the Federal Court in *Hayward v. City of Corpus Christi*, 111 Fed. 2d 637. The Court of Civil Appeals in the *Hayward* case, supra, refused to hold the Federal Court decision res judicata in the bond holders action against the City to recover the value of construction performed.

The *Brown* case (R. 255-263) filed in the United States District Court on September 24, 1962 is in sharp contrast to the *Atkinson* case. The parties plaintiff numbered 120 as contrasted to the 46 in the *Atkinson* case; the Defendants numbered 23 as compared to 1 in the *Atkinson* case; the alleged cause of action was predicated upon the 14th Amendment to the Constitution of the United States, the Federal Civil Rights law, the Securities Exchange Act and Federal Statutes against using the mails to defraud. The Plaintiffs in the *Brown* case did not purport to represent a class, but sued as taxpayers individually; the Class in the *Atkinson* case was not a "taxpayers" class (R. 22); the Defendants included alleged bondholders who were sued as the Representatives of a Class consisting of the Owners and Holders of all outstanding City of Dallas, Texas Airport Revenue Bonds. (R. 258) The injunction against construction of the runway was sought on the grounds that such construction and use

would create a burden on Interstate commerce in violation of the United States Constitution, (R. 260-261) and Federal and State Statutes and Regulations. (R. 260) The Respondents in the Prohibition and Mandamus cases affirmatively denied that the facts involved in the *Brown* and *Atkinson* cases were the same. (R. 55, 12) Without receipt of evidence what Court could tell? This Court is fully aware of the rapidity with which Federal Regulations often change!

The *Atkinson* case could not be *res judicata* of the issues in the *Brown* case because the parties to the two actions were not the same, except for 29 out of the 120 persons involved; the issues in the *Brown* case involved *outstanding* bonds, identified by Serial Number; the prayer was for Judgment declaring them void; the *Atkinson* issues went to a *proposed* issue of bonds, unidentified and prayed for an injunction against issuance and sale. An injunction against payment of outstanding bonds could not have been obtained in the *Atkinson* case because of lack of necessary parties, the bondholders. Payment could be enjoined in the *Brown* case if the *outstanding* bonds be held void.

The doctrine of *res judicata* is further complicated in this case by reason of the fact that the Respondent Supreme Court of Texas refused a Writ of Error in the *Atkinson* case with the notation, "Refused, No Reversible Error". (R. 4) The legal effect of this Notation is set out in Rule 483, Texas Rules of Civil Procedure (App. A-7) as meaning that the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals, in all respects, has correctly declared the law. In short its anyone's guess as to what por-

tions of the Civil Appeals opinion in the *Atkinson* case was right, and what was wrong.

The doctrine of *res judicata* could not be applied to enjoin prosecution of the Federal action by Petitioners, but even if it were possible the record shows that it was inapplicable because of lack of identity of subject matter, issues, and parties. The rule is so well established that citation of authorities is deemed unnecessary.

POINT FOUR

The issuance of the Writ of Mandamus by the Respondent Supreme Court was without its jurisdiction and a denial of due process to the Petitioners.

The opinion of the Respondent Supreme Court of Texas sets forth certain principles of law which are concurred in by the Petitioners: "The court's judgment (Civil Appeals denial of Writ of Prohibition) is not reviewable by appeal or writ of error." "Respondents urge that the relators are not entitled to relief from the Court of Civil Appeals because they seek relief only against the plaintiffs and their attorney in *Brown v. City of Dallas* and ask only for a writ of prohibition; that writs of prohibition issue to courts and not to litigants. Technically speaking, that is correct, * * *." "The judgment of the Court of Civil Appeals in *Atkinson v. City of Dallas* is not a judgment of this Court." (R. 277) "Conferral of jurisdiction on a court to do a given act invests it with the power to do the act * * *, but whether the act is to be done may be either discretionary or mandatory. When exercise of the power is discretionary, its exercise may not be

compelled by a superior court." "When an adequate remedy is otherwise available to a holder of rights under an appellate court judgment, the court which rendered it, may in its discretion, decline to exercise its original jurisdiction." (R. 279) "The remedy lies in the trial court in the defensive plea of *res judicata*; and the fact that (R. 279) the holder of rights under the prior judgment may be put to some trouble, delay and expense in defending the second suit does not render his remedy so inadequate as to require intervention by the appellate court through exercise of its original jurisdiction to enforce its judgment in the first suit." "The Supreme Court and Courts of Civil Appeals are primarily Courts of Review, and there is nothing in the constitutional and statutory provisions, or in our decisions, requiring them to exercise original jurisdiction to enforce their judgments when the same relief may be obtained relatively as expeditiously and inexpensively in the trial courts." (R. 280) "The Court of Civil Appeals may not, however, order or direct dismissal of *Brown v. City of Dallas*. A suit cannot be dismissed from the docket of a court without an order of the court; and any writ directing dismissal of *Brown v. City of Dallas* would invade the jurisdiction of the United States District Court to control its own docket." (R. 286)

Petitioners disagree with the Court's statement of the number 1. question in the case, (R. 276) which *assumes* two of the paramount issues; the Plaintiffs were bound by the judgment in the *Atkinson* case and sought to relitigate issues determined by that judgment. Those were disputed questions of fact and law. (R. 54-58; 67-74)

Petitioners disagree with the Court's conclusion, referring to its statement that technically a writ of prohibition issued to courts and not litigants: "However, incorrect identity of the writ sought is of no significance." (R. 277) The issuance of such a writ depends upon the prohibited court's failure to perform a ministerial act; to justify an injunction, it must be clearly established that applicant has no adequate remedy at law, and that he will sustain irreparable damage if the writ does not issue; facts to sustain these two premises were not alleged in either the Petition for Writ of Prohibition or the Petition for Mandamus. All rules of law are technical; failure to apply those rules constitutes a denial of due process. The record demonstrates that an adequate remedy at law had been resorted to by the plea of res judicata in the Federal Court, and the Court of Civil Appeals so found. (R. 12, 14)

The Supreme Court further held: "that exercise of such jurisdiction is mandatory when an actual interference with the enforcement of the judgment is coupled with the second suit or when the mere prosecution of the suit destroys the efficacy of the judgment." (R. 282) "The Court of Civil Appeals denied the relief sought on the ground that it had no jurisdiction to grant it." (R. 282, 283) The Court applied these two statements to justify issuance of the Mandamus. However, the Court of Civil Appeals did not deny the Writ of Prohibition on the ground that it had no jurisdiction to grant it. The Court of Civil Appeals denied the writ, *after exercise of its judicial discretion*, because: "The pendency of Action No. 9276 in the United States District

Court does not invade our exclusive jurisdiction, though the issues in the suit may be the same as the issues decided in our judgment of affirmance. Ours is not the only Court which has jurisdiction to enforce a plea of res judicata in support of our judgment of affirmance of December 15, 1961. That defense may be and has been pled by the City in Action 9276 in the United States District Court, and that Court has jurisdiction to hear and give effect to the plea: (R. 12) Petitioners contend in effect our jurisdiction is invaded because Respondents have filed a suit in another Court in which Respondents try to ignore the finality of our judgment. And Petitioners further contend that the only way our jurisdiction can be protected and respected is by the issuance of a writ of prohibition restraining the litigants from further prosecuting their suit in the other Court where it is now pending. We do not agree to such contention. To agree would be equivalent to hold that the conclusiveness of a judgment could never be determined except by the Court that rendered it. (R. 13) The Court of Civil Appeals further held: "In the instant case the United States District Court has done nothing to repudiate our judgment of affirmance; and we shall not assume that it will do any such thing. To the contrary we must assume that the United States District Court will give full effect to our judgment by sustaining a plea of res judicata if the issues before it should prove to be the same issues we have previously adjudicated." (R. 14).

These quotations from the opinion definitely establish that that Court *recognized that it had jurisdiction* to grant

the writ prayed for, that exercising its discretion it determined that the filing of the Federal suit was not an interference with the judgment in the *Atkinson* case, and that an adequate remedy at law existed in the Federal Court for determination of the plea of res judicata. To justify issuance of the Writ, the Supreme Court of Texas reversed these findings made in the exercise of judicial discretion, which action could only be taken by a court having appellate jurisdiction.

The Respondent Supreme Court of Texas then went on to make findings of fact and law on the question of res judicata. (R. 283, 284) and found that all issues raised in the *Brown* case, had been decided in the *Atkinson* case, or could have been decided therein. This conclusion was based on misconstruction of the pleadings in the two cases. A patent error appears in the Court's opinion stating the issues in the *Brown* case: "At issue is the validity of certain revenue bonds, known as Love Field Revenue Bonds, sought to be issued and sold by the City of Dallas, * * *" (R. 283) The bonds attacked in the *Brown* case had been issued and sold; the prayer of the suit was to enjoin their payment. The second patent error in the Supreme Court's sustention of the plea of res judicata lies in their holding (R. 284): "All of these issues and all subsidiary issues raised by the pleadings but not here mentioned, as well as all issues which by diligence could have been raised and tried, were determined and foreclosed * * *" by the *Atkinson* judgment. The outstanding revenue bonds attacked in the *Brown* case could not have been declared void in the *Atkinson* case, because

they were not pleaded, there were no holders of outstanding bonds party to the action, and for lack of necessary parties no judgment declaring their invalidity or enjoining their payment could have been entered.

The action of the Respondent Supreme Court in deciding the *plea of res judicata* was an exercise of discretion reserved, in the instant case, to the Court of Civil Appeals. (R. 278)

The Supreme Court of Texas further erred in holding that the parties in the *Brown* case were members of the Class involved in the *Atkinson* case; the record demonstrates that the class in the *Atkinson* case was not described as taxpayers of the City of Dallas. (R. 22) If that were true, then the injunction or writ of prohibition ordered to be issued, and issued, was void as discriminatory against Petitioners herein. It is clearly illegal to enjoin part of the taxpayers of a City from attacking allegedly illegal bonds while permitting other taxpayers, not resident in a particular area to make such an attack.

The principles agreeable to the issuance of the Writ of Mandamus are stated in *State Board of Insurance v. Betts*, 158 Tex. 83, 308 SW 2d 846, 848:

"This Court is not vested with general supervisory power over the District Courts but its original jurisdiction is limited to that conferred by definite constitutional provisions and statutes enacted thereunder. (citations) Before the relief prayed for may be granted by this court it must definitely appear that the questioned orders of the district court are

wholly void. If an exercise of discretion by the district judge be involved *this Court may not assert its original jurisdiction to enforce its own judgment*, even though the actions of the district judge may have been improvident or otherwise erroneous. *Seagraves v. Green*, 116 Tex. 220, 288 SW 417. "The Writ (of Mandamus) will not lie to correct a merely erroneous or voidable order of the trial judge, but will lie to correct one which he had no power to enter, and which was therefore void."

The Denial of a Writ of Prohibition was an order which the Court of Civil Appeals had jurisdiction to enter. (R. 278) It was not void. The Supreme Court of Texas acted in excess of its jurisdiction in issuing the Writ of Mandamus contrary to agreeable principles of law. The issuance of such Writ was also void under the Rule of Law set out in *Central National Bank v. Stevens, supra*, which after denying the right of a State Court to enjoin proceedings in a Federal Court stated: "The fact, therefore, that an injunction issues only to the parties before the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is litigant in another and independent forum."

Petitioners submit that the action taken against Petitioners herein by the Respondent Supreme Court of Texas was void under State and Federal law and constituted a denial to Petitioners of due process and equal protection of the laws guaranteed by the Constitutions of the United States and Texas.

POINT FIVE

The Respondent Court of Civil Appeals was without jurisdiction to issue a Writ of Prohibition against Petitioners' prosecution of their Federal Court action, and its punishment of Petitioners for contempt for violation of a void writ constituted a denial to Petitioners of due process and equal protection of law.

The argument and authorities set forth under point one of this Brief is applicable to the authority of the Respondent Court of Civil Appeals to issue the alleged Writ of Prohibition.

In addition to the Writ being void as an illegal effort to prevent prosecution of a cause pending before the United States District Court, it was void under the law of the State of Texas.

The Court in its recitals precedent to its order of Prohibition stated that the writ was issuing in compliance with the orders of the Supreme Court of Texas, handed down March 13, 1963. (R. 78) If the Supreme Court Orders were void, then the Writ of Prohibition issued pursuant to it was also void.

It is further submitted that at the time of the issuance of the alleged writ of prohibition, the Respondent Court of Civil Appeals was without jurisdiction of the parties whom it sought to restrain. The Judgment of that Court denying the application of the Defendants in the *Brown* case for a Writ of Prohibition was entered October 24, 1962 (R. 15); Motion for Rehearing was denied November 23, 1962 (R.

19); the Judgment then became final for there was no provision for review by appeal or writ of error (R. 277). The Court therefore lost jurisdiction over all parties to the action, except for the purpose of enforcing the judgment entered.

Four and one-half months after that Judgment became final the Court of Civil Appeals without notice to the Petitioners herein or their Attorney entertained an ex parte application from the Defendants in the *Brown* case and purported to reverse the Judgment it had entered on October 24, 1962. It had then lost jurisdiction over the persons attempted to be restrained and the reversal of the Judgment and issuance of the writ of prohibition without notice constituted a lack of due process.

Even if it be conceded for the purpose of argument, that the Judgment might be reversed and a Writ of Prohibition issued without having the parties in Court, the Court of Civil Appeals wholly failed to comply with the statutes governing the issuance of its process.

Rule 394 of the Texas Rules of Civil Procedure (App. A-6) provides for the manner in which process shall issue from the Court of Civil Appeals, and the method for its service. That Rule states that a writ issuing from the Court shall bear the teste of the Chief Justice under the seal of the Court and be signed by the clerk thereof. It also provides that it shall be directed to the party or court to be served and that it may be served by any constable or sheriff of any county in the State of Texas where the person to be served could be found.

The record shows (R. 78-82) that the Writ was not directed to anyone; it did not bear the seal of the Court or the signature of the Clerk of the Court; it was not served by a constable or Sheriff but was alleged to have been mailed. (R. 244 Exhibit 20, apparently never received in evidence)

For the reasons stated, the failure to comply with the requirements for issuance and service of process, the alleged writ was a nullity and had no legal effect. A construction of the effect of statutes and rules governing process was made in *Nichols v. Wheeler*, 304 SW 2d 233, R.N.R.E. p. 233 where the court after reciting requirements for service of process stated: "If applicable here, these requirements are mandatory and a failure to comply with such provisions renders the service of process here of no effect."

Even if it be conceded that the process was legal, the judgment of contempt was invalid as unsupported by the evidence presented in support of the charges of contempt. Primary defect is the total failure of the proponents of the Motion to introduce *in evidence any order restraining anyone from doing anything*, even though the Defendants in the contempt proceeding denied that any valid order had ever been issued. (R. 113, 172) The record (R. 242) also demonstrates that the Orders to Show cause were also not in conformity to the statutes governing the Courts process.

The record also shows that although Petitioners herein challenged the authority of the City Attorneys to file the Motion for Contempt (R. 111, 233) that authority was never proven.

Passing to the Judgment of Contempt (R. 248, 254) we find that some of the Petitioners were convicted of contempt for having "failed to request the United States District Court to dismiss Cause No. 9276, styled Daniel C. Brown et al., v. City of Dallas et al.". An examination of the alleged writ of prohibition fails to show any direction to Petitioners to dismiss the *Brown* suit, and the Supreme Court expressly warned the Court of Civil Appeals not to direct or order dismissal of the *Brown* suit. (R. 286)

Twenty-six Plaintiffs in the *Injunction* case were held in contempt for filing that suit in Federal Court to enjoin the interference by the State Courts with their action pending in Federal Court. These people and their Attorney were punished, the clients by fine and the Attorney by twenty days in jail, even though such action was never prohibited by any order appearing in the record. *No other charge was placed against these litigants or the Attorney.* (R. 251) However, other Petitioners were charged and convicted of the same offense. (R. 250)

The Court having lacked jurisdiction to issue process prohibiting Petitioners from prosecution of their Federal Court action, and having wholly failed to comply with procedure governing issuance and service of State process, and having failed, in proceedings for contempt, to prove any order violated by the Petitioners, the conviction of contempt entered by the Court of Civil Appeals was a nullity and should be set aside as in violation of Petitioners rights of due process and equal protection of the laws.

CONCLUSION

All action taken by the Respondent Court of Civil Appeals, the Respondent Supreme Court of Texas, and the United States District Court for the Northern District of Texas, subsequent to the Judgment of the Court of Civil Appeals denying Writ of Prohibition, entered October 24, 1962, Rehearing denied November 23, 1962 was in excess of the jurisdiction of said Courts and wholly void; such action constituted a denial to Petitioners of due process of law and equal protection of the law as guaranteed by the Constitutions of the United States and Texas.

Petitioners pray that this Court grant Judgment: 1. Directing the Supreme Court of Texas to reverse its Judgment entered in Cause No. A-9340, City of Dallas et al., v. Hon. Dick Dixon Chief Justice et al., on March 13, 1963. (R. 58)

2. Directing the Court of Civil Appeals, 5th Supreme Judicial District of Texas to reverse its Judgment of Contempt entered in Cause No. 16193, City of Dallas v. Daniel C. Brown et al., on May 22, 1963 (R. 248-254) restoring to the parties all fines and costs collected thereunder.

3. Directing the Court of Civil Appeals, 5th Supreme Judicial District of Texas to reverse its judgment or Order entitled Writ of Prohibition and Ancillary Orders (R. 78-82) entered in Cause No. 16193, City of Dallas et al., v. Daniel C. Brown et al., under date of April 16, 1963.

4. Directing the United States District Court for the Northern District of Texas to reverse its Judgments entered in

Cause No. 9276, Daniel C. Brown et al., v. City of Dallas et al., on May 9, 1963 (R. 307) and June 14, 1963 (R. 315, 316) and to proceed to trial of the cause on its merits.

5. Directing the United States District Court for the Northern District of Texas to reverse the Judgment it entered in Cause No. CA-3-63-120, Donovan et al., v. Supreme Court of Texas et al., (R. 335) entered June 21, 1963; and to render Judgment for the Plaintiffs in said action for the relief prayed for in the Complaint.

6. Judgment directing that all costs incurred in this proceeding and in the suits where judgments be reversed be taxed against Petitioners' opponents therein and the Respondents herein.

Respectfully submitted,
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I hereby certify that I have this 29th day of February mailed 5 copies of the foregoing Brief for Petitioners to Henry P. Kucera, Attorney for Respondents, 501 City Hall, Dallas 1, Texas.

James P. Donovan
JAMES P. DONOVAN

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APPENDIX

Relevant Constitutional and Statutory Provisions

Constitution of the United States

Article III, Section 1. The Judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *

Section 2. The Judicial Power shall extend to all cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their authority. * * *

Article IV. Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of citizens in the several states. * * *

Amendment V. No person shall be * * * deprived of life, liberty, or property, without due process of law.

Amendment XIV. Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

Title 42, Section 1971. All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial

subdivision, shall be entitled and allowed to vote at all such elections without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

Title 42. Section 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, taxes, licenses, and exactions of every kind and to not other.

Title 42. Section 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

Title 42. Section 1985 (2d) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified; * * * or if

two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; * * *

Title 15, Section 77q. Fraudulent interstate transactions (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, to directly or indirectly—(1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. * * * (c) The exemptions in section 77c of this Title shall not apply to the provisions of this section.

Title 15. Section 77v. (a) The district courts of the United States, and the United States Courts of any territory, shall have jurisdiction of offenses and violations under this subchapter * * * and concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. * * *

Title 28. Section 1331. The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000 exclusive of costs or interest, and arises under the Constitution, laws or treaties of the United States.

Title 28, Section 1343. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * * (3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Title 28 Section 2283. A Court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Title 28, Section 1651. (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

RULES OF FEDERAL PROCEDURE

Rule 12— * * * If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a

claim upon which relief can be granted; matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given a reasonable opportunity to present all material made pertinent to such motion by Rule 56.

TEXAS CONSTITUTION

Article 5, Section 3. The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in case of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. * * *

Article 1, Section 3. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public service.

Article 1, Section 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

STATUTES OF TEXAS

Article 1733. The Supreme Court or any Justice thereof, shall have power to issue writs of procendo, certiorari and all writs of quo warranto or mandamus agreeable to the principles of

law regulating such writs, against any district judge, or Court of Civil Appeals or judges thereof, or any officer of the State Government, except the Governor.

Article 46d-9 * * * For such purposes, a municipality may issue general or special obligation bonds, revenue bonds * * * the authority hereby given for the issuance of such bonds and levy and collection of taxes to be exercised in accordance with the provisions of * * * Article 701 et seq. * * *

Article 701. The bonds of a county or an incorporated city or town shall never be issued for any purpose unless a proposition for the issuance of such bonds shall have been first submitted to the qualified voters who are property tax payers of such county, city or town.

TEXAS RULES OF CIVIL PROCEDURE

Rule 394. Issuance of process. Any writ or process issuing from any Court of Civil Appeals shall bear the teste of the Chief Justice under the seal of said court and be signed by the clerk thereof, and, unless expressly provided by law or by these rules, shall be directed to the party or court to be served, and may be served by the sheriff or any constable of any county of the State of Texas within which such person to be served may be found, and shall be returned to the court from which it issued. Whenever such writ or process shall not be executed, the clerk of such court shall issue another like process or writ upon the application of the party suing out the former writ or process.

Rule 483. " * * *. In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation "Refused. No Reversible Error."

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1963

JAMES P. DONOVAN, et al., *Petitioners*,

v.

CITY OF DALLAS, et al., *Respondents*.

APPLICATION FOR WRIT OF CERTIORARI TO THE SUPREME COURT
OF TEXAS AND THE COURT OF CIVIL APPEALS OF THE STATE OF
TEXAS, FIFTH SUPREME JUDICIAL DISTRICT

BRIEF FOR RESPONDENTS

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IN THE
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OCTOBER TERM, 1963

No. 264

JAMES P. DONOVAN, et al., *Petitioners*,

v.

CITY OF DALLAS, et al., *Respondents*.

APPLICATION FOR WRIT OF CERTIORARI TO THE SUPREME COURT
OF TEXAS AND THE COURT OF CIVIL APPEALS OF THE STATE OF
TEXAS, FIFTH SUPREME JUDICIAL DISTRICT

BRIEF FOR RESPONDENTS

I

Opinions Below

The opinion of the Supreme Court of Texas in *City of Dallas v. Dixon*, R. 276-286, is reported at 365 S.W. 2d 919 (Tex. 1963).

The judgment of the Court of Civil Appeals, for the Fifth Supreme Judicial District of Texas in the Original Con-

tempt Proceedings in *City of Dallas v. Brown*, appears at R. 248-254.¹ (May 22, 1963).

The Per Curiam Opinion of the Court of Civil Appeals in *City of Dallas v. Brown* (Petition, 27a) is reported at 368 S. W. 2d 240 (June 7, 1963).²

II

Constitutional and Statutory Provisions

Art. 5, Section 3, Texas Constitution, provides as follows:

"§ 3. Jurisdiction of Supreme Court; writs; sessions; clerk

"Sec. 3. The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the Judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law or

¹ While not cited for Review in the Petition for Certiorari, Petitioners' Brief on the Merits page 1 cites *City of Dallas v. Brown*, R. 10-18, reported at 362 S. W. 2d 372 (1962), as an Opinion Below. This opinion was entered on October 24, 1962, R. 15.

² As this Court by its Order of October 21, 1963 did not grant Certiorari to the United States District Court, R. 354, the opinions of the United States District Court, Northern District of Texas in *Brown v. City of Dallas*, R. 306, 307, and *Donovan v. Supreme Court of Texas*, R. 347-354, are not here under review. Indeed R. 255-354 except for the Order Allowing Certiorari, R. 354, is only material to show the extensive due process which has been accorded to Petitioners.

where a statute of the State is held void. The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.

"The Supreme Court shall also have power, upon affidavit or otherwise as by the court may be determined, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction."

Art. 1733 Vernon's Annotated Civil Statutes of Texas confers power upon the Supreme Court of Texas to issue a writ of mandamus:

"The Supreme Court or any Justice thereof, shall have power to issue writs of procedendo, certiorari and all writs of quo warranto or mandamus agreeable to the principles of law regulating such writs, against any distant judge, or court of Civil Appeals or judges thereof, or any officer of the State Government, except the Governor."

Art. 1826, Vernon's Annotated Civil Statutes of Texas, grants power to Courts of Civil Appeals to punish for contempt as follows:

"They may punish any person for a contempt of said courts, not to exceed one thousand dollars fine or imprisonment not exceeding twenty days."

Art. 1269j-5 Vernon's Annotated Civil Statutes of Texas, provides that all cities having a population of more than seventy thousand (70,000) may issue revenue bonds for enlarging or extending or repairing or improving its airport, or for any two (2) or more such uses. The text of this statute is included in Appendix A *infra*, pages 54-56.

III

Questions Presented

Respondents believe that the questions properly before this Court are the following:

1. Where by law any public project is automatically stopped by pending litigation, regardless of merit, may class action litigants seeking to prevent construction of an airport runway after losing on the merits in the Texas courts (with certiorari denied in this Court) relitigate the merits of their claim in Federal District Court in open defiance of a valid Texas state court order which prohibits such relitigation?
2. May Texas courts protect their judgment by prohibiting relitigation of the claim on which it is based in Federal court when such order is clearly necessary because a *res judicata* plea is an inadequate remedy as the mere filing of the relitigation claim automatically destroys the effectiveness of the Texas Court's judgment?
3. Is refusal to discontinue prosecution of the Federal Court action, and the filing of a new complaint in Federal Court seeking an injunction against the individual judges of the Texas Court who had issued the order prohibiting the relitigation, contemptuous conduct?
4. Are parties who have defied a valid court order deprived of due process of law when found guilty of con-

tempt after reasonable, full notice, hearing, and opportunity to purge themselves of the contempt?

IV

Statement of the Case

1. Summary of the Facts

This case involves contempt penalties assessed against Petitioners for admitted violations of an order of the Texas Court of Civil Appeals to cease attempts to relitigate the merits of a dispute decided by Texas courts in 1961, with this Court denying Certiorari in 1962.

Some of the Petitioners brought a class action on behalf of landowners adjacent to Love Field, the Dallas airport, to restrain construction of a new airport runway parallel to an existing runway, and to prevent the issuance of bonds to pay for said runway and any damages caused thereby (*Atkinson v. City of Dallas*). That Complaint was dismissed on the ground, among others, that under Texas law there can be no injury to or taking of the air rights or property of Petitioners without compensation. Article I, Section 17 of the Texas Constitution so provides. Dallas must therefore pay any damages caused to Petitioners and other adjacent landowners by said new parallel runway.

After losing their *Atkinson* case to enjoin the runway's construction in three Texas courts, and this Court, said Petitioners filed *Complaint number two* (*Brown v. City of Dallas*) seeking essentially the same relief in the United States District Court for the Northern District of Texas two hours before the City was to receive sealed bids for the sale of the bonds. This Complaint was intended to and did prevent the sale of the bonds as bonds cannot be issued

while any litigation is pending—no matter how frivolous the litigation may be. *City of Dallas v. Dixon*, R. 280, 283.

When Petitioners filed *Brown* in Federal Court, the City of Dallas then sought an order from the Court of Civil Appeals prohibiting Petitioners from prosecuting this action and from filing any further litigation to prevent the construction of the runway or the sale of the bonds to finance it. The order was granted after the Texas Supreme Court had stated in a decision upon a mandamus petition that it should be granted. Petitioners further violated that order by filing *Donovan v. Texas Supreme Court* against the individual members of the Supreme Court of Texas and the individual members of the Court of Civil Appeals in the Federal Court asking that enforcement of the prohibitory order be enjoined. These are the very Judges who had ordered that no such new litigation be filed. Petitioners also violated the order by vigorously continuing the prosecution of their *Brown* case in the Federal Court, adding new parties of the same class and dropping other parties. After notice and a hearing before the Texas Court of Civil Appeals a judgment of contempt for these violations was entered, after each Petitioner had an opportunity to purge himself and avoid punishment. For example Petitioner Donovan could have escaped serving his 20-day sentence by dismissing his complaint against the Texas Judges as it is the only Complaint in which he is a plaintiff, while other Petitioners were given 6 days to withdraw from the two Federal Court cases and escape their \$200 fines. Twenty six Plaintiffs chose to purge themselves.

It is to review the judgments of contempt against those who did not purge themselves that this Petition was brought.

The important facts herein are many and complicated so

7

the foregoing summary is presented, but it is believed that the full statement now presented is essential to Respondents' answer herein.

2. *Petitioners' First Case to Prevent Airport Runway Parallel to Existing Runway*

The contempt penalties herein involved were imposed upon Petitioners for violating an Order of the Court of Civil Appeals, Fifth Supreme Judicial District of Texas. R. 78-82. The Order of the Court of Civil Appeals was issued pursuant to a mandate of the Supreme Court of Texas in *City of Dallas v. Dixon* (R. 248-254) ordering it to enforce its judgment in the case of *Atkinson v. City of Dallas*, 353 S.W. 2d 275, cert. den., 370 U.S. 939, rehearing denied 371 U.S. 854.

This case, as did *Atkinsan*, arises from a determination of the City of Dallas to construct, without use of Federal funds, a runway parallel to an existing runway at its municipal airport, Love Field, and to issue revenue bonds to pay for the improvements. Petitioners are property owners and residents more than 2,000 feet removed from the airport who object to the construction of the new runway.

The *Atkinson* case was filed on April 3, 1961, as a class suit in the District Court of the State of Texas. R. 20, 22. Atkinson attacked both the construction of the runway and the validity of certain revenue bonds which the City was about to issue to finance construction of the runway. R. 20-34..

On April 7, 1961, a temporary injunction was denied by the District Court after hearing three days of oral testimony. R. 3.

On July 17, 1961, the District Court denied the request in *Atkinson* for a permanent injunction and rendered a Summary Judgment in favor of the City. R. 11. On De-

ember 15, 1961, the Court of Civil Appeals affirmed the Summary Judgment, R. 11, and on January 19, 1962, a motion for rehearing was overruled. R. 11.

The Supreme Court of Texas on March 14, 1962, denied a Writ of Error with the notation "no reversible error" and announced that a motion for rehearing would not be entertained. R. 11.

This Court on June 25, 1962, denied a Writ of Certiorari, 370 U.S. 939. On October 8, 1962 a Motion for Rehearing was also denied, 371 U.S. 854.

3. Petitioners' Second Case Seeking to Relitigate Same Issues and Respondents' Actions to Prevent Relitigation

On September 24, 1962, the day on which bids for the selling of the Love Field Revenue Bonds were to be opened, Petitioners filed Civil Action No. 9276, *Brown v. City of Dallas*, in the United States District Court seeking substantially the same relief sought in *Atkinson*, i.e. a permanent injunction to restrain, among other things, the building of the runway at Love Field and the issuance of revenue bonds to pay therefore. R. 255-263. *Brown* was filed by 122 plaintiffs, 30 of whom were Plaintiffs in the *Atkinson* case filed April 3, 1961. R. 285.

On October 2, 1962, the City of Dallas filed an application for a Writ of Prohibition in the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas seeking to enjoin Petitioners from preventing the sale of the bonds through the device of relitigating *Atkinson*. They asked that the Court use this Writ to enforce its judgment in the *Atkinson* case, by prohibiting the Petitioners from attempting to relitigate the same issues, from interfering with the issuance and sale of the Love Field Revenue Bonds and also that the Plaintiffs be required to dismiss said cause.

and refrain from filing any other litigation to prevent construction of the runway or the sale of the bonds.

Four days later, on October 6, 1962, Petitioners filed a motion in the United States District Court in the *Brown* case for an injunction against the Texas Court of Civil Appeals to enjoin it from considering or acting upon the Application for a Writ of Prohibition and other Ancillary Mandatory Matters pending therein. On October 10th the United States District Court denied said motion. R. 12.

On October 12, 1962, the City of Dallas filed a Motion to Dismiss the Complaint and an Original Answer in the United States District Court in the *Brown* case. R. 267.

The Writ of Prohibition was denied by the Court of Civil Appeals on October 24, 1962, R. 10-15, with a dissenting opinion filed by Justice Young. On November 23, 1962, a Motion for rehearing was overruled. R. 19.

On December 8, 1962, the City of Dallas filed a Petition for a Writ of Mandamus in the Supreme Court of Texas asking that Court to order and direct the Court of Civil Appeals to enforce its judgment in the *Atkinson* case. R. 1. Petitioner Donovan and his clients were parties to this action; they filed an answer and appeared at the proceedings. R. 54.

The Supreme Court of Texas on March 13, 1963, after a hearing and consideration of briefs, ordered the Court of Civil Appeals to enforce its judgment in *Atkinson* by issuing whatever writs it found to be necessary. The Supreme Court of Texas also said that if the Court of Appeals failed to do so, it would issue a peremptory writ of mandamus commanding, compelling and requiring the Court of Appeals to do so. *City of Dallas v. Dixon*, R. 58. A motion for rehearing was denied on April 10, 1963. R. 78. No action was taken by Petitioners either to request a stay order or to cause the decision of the Texas Supreme Court

in the mandamus case to be reviewed by this Court until now after the contempt proceeding has been completed, and the judgments rendered therein are satisfied. The Petition for Certiorari herein was filed on the 89th day after the Judgment of the Texas Supreme Court became final.

The Supreme Court of Texas in its opinion stated that the parties in the case of *Brown v. City of Dallas*, in the Federal Court, were bound by the decision in the *Atkinson* case, as the *Atkinson* case was a class action and the judgment binds all members of the class insofar as validity of the bonds and the right of the City to construct runways are concerned if the class were adequately represented by those who sued on behalf of the class. R. 285-286. The Court held that the plaintiffs in the *Brown* case clearly were members of the class represented by the plaintiffs in the *Atkinson* case, the issues sought to be litigated in *Brown* are essentially the same as the issues litigated or which could have been litigated in *Atkinson*, the same ultimate relief is sought, and that no suggestion was made that the Petitioners were not adequately represented in *Atkinson*. Accordingly, the Supreme Court of Texas concluded that it was

“—the duty of the Court of Civil Appeals For The Fifth Supreme Judicial District to enforce its judgment in *Atkinson v. City of Dallas* by issuing whatever writs are necessary and effective to restrain the plaintiffs and their attorney in *Brown v. City of Dallas* from further prosecution of that suit.” R. 286.

In so doing the Texas Supreme Court recognized that the mere filing of the second (*Brown*) action destroyed the efficacy of the judgment in *Atkinson*. R. 283. It also rec-

ognized that a plea of *res judicata* is not an adequate remedy under such circumstances. R. 280.

The Court stated that the Court of Civil Appeals could not order or direct the dismissal of *Brown v. City of Dallas* in the Federal Court, as a suit cannot be dismissed from the docket of a court without an order of the court and any writ directing dismissal would invade the jurisdiction of the United States District Court to control its own docket. The Court added, however, that there was every indication that the matter had reached the point of "vexatious" and "harassing" litigation and that the Court of Civil Appeals should grant all necessary and proper writs for the enforcement of its *Atkinson* judgment and also it might enjoin other suits to relitigate the same issues which may be filed by other members of the class bound by the *Atkinson* judgment. R. 286.

The Supreme Court of Texas on April 10, 1963, directed the Clerk to transmit a copy of its Judgment and Opinion to the Court of Civil Appeals and also to serve copies on Attorney Donovan. The Supreme Court also requested that the Court of Civil Appeals advise "—whether your Court will, or has, complied with the provisions of the judgment and Opinion of this Court." R. 287-288.

On April 16, 1963, the Court of Civil Appeals after consideration of the opinion of the Texas Supreme Court set aside its judgment rendered on October 24, 1962, R. 80, and issued the Writ of Prohibition and Ancillary Orders. R. 78-82.

Petitioners herein, individually and as a class, and others in the same class, were prohibited and enjoined from in any manner interfering with the enforcement and execution of the judgment in the case of *Atkinson, et al. v. City of Dallas*. R. 80-81. The order prohibited further prosecu-

tion of pending litigation and the filing of new litigation for that purpose.

Petitioner Donovan, attorney for most of Petitioners herein, was present in person in the Court when the Writ of Prohibition and Ancillary Orders was issued. He was personally served with the Order by the Chief Justice. R. 81, 149, 200-201. He admitted this at the contempt hearing. R. 149.

Thereupon, on April 24, 1963, the City of Dallas filed a Supplemental Motion to Dismiss the *Brown* case in the Federal Court. R. 274.

4. Petitioners' Actions After Order of Prohibition Which Constitute Violations Thereof

Attorney Donovan, through acts which are admittedly direct violations of the Writ of Prohibition issued by the Court of Civil Appeals, proceeded in two directions. On behalf of himself and other Petitioners he filed lawsuit Number 3, i.e., *Donovan v. The Supreme Court of Texas, et al.* in the United States District Court on April 23, 1963, praying that the Federal Court grant an injunction against the individual members of the Court of Civil Appeals and the individual members of the Supreme Court of Texas restraining them from enforcement of the order of prohibition, R. 316-324, issued to carry out the judgment in *Atkinson*. He also filed an answer to the City's motion to dismiss lawsuit number two, the *Brown* case, and vigorously opposed Respondents' motion to dismiss that action. R. 292-306.

At a preliminary hearing in the *Brown* case on May 9, 1963, in the United States District Court, Mr. Donovan appeared; R. 294, as attorney for Petitioners and filed a motion to dismiss certain persons as plaintiffs and also to add new party plaintiffs, R. 293. The Federal Judge

granted the Motion to Dismiss certain of the plaintiffs and, before permitting the new party plaintiffs, required assurance that they had been notified that to prosecute the suit they might be in contempt of the order of the Civil Court of Appeals. Attorney Donovan advised that the new party plaintiffs had been so warned. R. 293, 294.

Thereafter on the same date the United States District Court dismissed the Brown case as being "without merit" (R. 307), indicating that the parties, issues, and relief sought were those decided in the Atkinson case and no justiciable issue was therefore presented. R. 306. The Federal District Court stated that Petitioners were attempting to make it an appellate court for the Texas Supreme Court. The Court stated further that Petitioners should have appealed to the United States Supreme Court and not to the Federal District Court. R. 306. On June 14, 1963, the District Court dismissed an appeal from this order upon request of Attorney Donovan and his clients. R. 314, 315.

On May 16, 1963, the United States District Court, after hearing Petitioner Donovan's application to enjoin the Supreme Court and the Court of Civil Appeals from enforcing the Atkinson judgment, R. 336-352, overruled a motion by Donovan to bar the Attorney General from appearing, R. 335, and dismissed the suit. R. 353.³

³ Petitioners state on page 25 of their Brief, as Point Two, that the United States District Court should have decided the case. However, it should be noted that this Court by its Order of October 21, 1963, did not grant Certiorari to the United States District Court, R. 354. The opinions of the United States District Court, Northern District of Texas in, *Brown v. City of Dallas*, R. 306, 307, and *Donovan v. Supreme Court of Texas*, R. 347-354, are therefore not here under review. However, as stated above, and in the Record 306-307, 349-353, the Federal Court did decide the cases to be without merit.

5. *The Contempt Proceedings*

On May 7, 1963, the City of Dallas filed a Motion praying that the Court of Civil Appeals issue notice to Petitioner Donovan and his clients to show cause why they should not be held in contempt for violation of the Writ of Prohibition and Ancillary Orders. R. 82-90. On May 10, 1963, James P. Donovan filed a Motion For Continuance, R. 93-95, in which he stated, under oath, that he had been served with an Order to Show Cause, directing him to appear before that Court at 9:00 a.m. on Monday, May 13, 1963 to show cause why he should not be punished for contempt of this Court, R. 93-94, and that he had been advised that numerous respondents whom he represented had likewise been served with similar orders, R. 94; and that as it was doubtful that he could prepare defenses by May 13th, he requested additional time to May 20, 1963. By a Supplement To His Motion For Continuance, Petitioner Donovan then listed, by request of the Court, names of all petitioners for whom a continuance of the contempt proceedings was requested. R. 95-97. The Court on May 13, 1963, after hearing, granted Petitioner Donovan's Motion For Continuance to May 20, 1963. R. 97. At this hearing, it may be pointed out, certain parties noted their withdrawal from the lawsuit. R. 98-108.

On May 20, 1963, a Motion to Quash and an Answer to Charges was filed by Petitioner Donovan for 85 Petitioners. R. 109-117. The Motion was heard on May 20, 1963, R. 117-235, at which time Petitioner Donovan appeared for the respondents. R. 117. The Court reviewed the history of the litigation and emphasized what was involved in the Contempt proceedings. R. 122, 123. The Court then called the name of each Respondent individually to determine if he was present or represented by Counsel and whether he knew the nature of the proceeding, R. 124-136. Attorney

Donovan presented a reply argument on Behalf of the Respondents he represented. R. 139-159. The Motion to Quash was denied, R. 162. A list of names to whom a copy of the Writ of Prohibition and Ancillary Orders had been sent was admitted into evidence (R. 171, 241-247) testimony was taken, and adequate time and opportunity was given to anyone who wished to be heard. R. 187-235.

Attorney Donovan stated in open Court that he advised "all of his clients not to testify and I am sure they will avail themselves of the privilege not to testify, as provided for in the Constitution of the United States and Texas." R. 221.

The Chief Justice then noted, however:

"Mr. Donovan has, in open court, advised his clients not to testify. I am sure Mr. Donovan is authorized to give that advice. However, I think that if any of you care to override his advice, you have a right to appear if you want to.

"I am not advising you to, or suggesting you do so. You have an attorney, and I want to respect your right to refuse to testify. But I also want to respect your right to testify if you insist, over Mr. Donovan's objection, though he is your attorney.

"Do any of you wish to testify?"

"(No response).

"The Chief Justice: I take it then, and the record will show that everyone here was given an opportunity to testify. And they were also notified that they didn't have to testify; not required to.

"Mr. Kucera: Your Honor, may the record also show that the City of Dallas was ready and present in Court, and every one of these parties that was cited for contempt to testify, upon advice of counsel they have re-

fused to do so. And also was given an opportunity individually to select whether they wanted to follow the advice of counsel, and they declined to take the stand.

"The Chief Justice: I think the record so shows. Is that true, Mr. Donovan?

"Mr. Donovan: Yes, Your Honor, except the one thing that I said, that as of this moment that is my advice. I reserve the right as the proceeding goes forward to change that advice if it becomes proper.

"The Chief Justice: Very well."

6. *The Contempt Judgments*

On May 22, 1963, the Court of Civil Appeals issued its Judgment of Contempt (R. 248-254) saying, "We have come to this conclusion that there has been a defiance of law, and that it is our duty to take notice of it and to take appropriate steps in view of it," R. 235. It then proceeded to fine certain defendants \$200 each and sentence Petitioner Donovan to 20 days in the County Jail of Dallas County (R. 237-238) pursuant to its Judgment of Contempt. R. 248-254.

The Court in its Opinion, *City of Dallas v. Brown*, 368 S.W. 2d 240 (Petition 27a) comprehensively reviewed the facts on which its contempt judgment was based and stated:

"The testimony presented upon this hearing abundantly demonstrates that all of the respondents are guilty of contempt of this Court. Respondents have been shown to have knowingly violated the orders of this Court which were issued in pursuance to a mandate of the Supreme Court of Texas. Such willful disobedience to a valid order of a Court constitutes contempt which cannot be tolerated. Respondents' contention that they had not been afforded their day in court is entirely without merit. As demonstrated by

the foregoing facts, respondents have had their full day in court. The issues have been presented to twenty-three judges comprising every court from the trial court to the United States Supreme Court and these judges have, without a single dissent, decided the issues against respondents. Over a period of two years respondents have had the benefit of every judicial hearing available in both State and Federal Courts. The issues having been adjudicated against them they must necessarily recognize the end of litigation. There must be an end to litigation else there would be no purpose of beginning litigation." (Petition 35a-36a).

Subsequently, Petitioner Donovan was committed to the Dallas County Jail, and the Petitioners who had been properly served and who had not purged themselves of contempt were fined \$200 each.

The Court also noted in its Opinion:

"During the hearing of this matter the respondent, Attorney James P. Donovan, made many irresponsible statements concerning our courts which clearly demonstrates his attitude: For example, he assailed the judgment of the Supreme Court of Texas contending that 'it isn't worth, in our opinion, the paper it was written on.' At another point he said, in effect, that he and his clients were not in contempt of this Court; that they were probably in contempt of the Supreme Court of Texas but they were not being tried for that. (Footnote 1). He admitted that, in response to an inquiry from the United States District Judge, that he had advised his clients that they were subjecting themselves to a contempt action by proceeding in the Federal Court case. The whole record illustrates one fact clearly, that is, that the respondents, with full knowl-



edge of the facts, followed Attorney Donovan's advice and counsel to the effect that orders of the court were invalid and should be disobeyed or ignored." Petition 36a, 37a.

In a footnote the Court observed:

"It is of interest to note other irresponsible and un-lawyerlike statements made by Respondent Donovan, which illustrate his general attitude towards courts. For example, he charged the Assistant City Attorney with 'tampering with the Court' (referring to the Federal Court), and that he did not 'believe in backdoor jurisprudence' (still referring to the United States district Court)." Petition 37a.

7. Petitioners Were Given Opportunity to Purge Themselves of Contempt

Petitioner Donovan and the other Petitioners were given opportunity to absolve or purge themselves of the contempt judgments. R. 254. The Contempt Judgment provided that each of the Respondents pay the fine of \$200 within six days or so failing be imprisoned until such time as they shall have purged themselves of contempt by payment of the fine "or until the further orders of this Court." R. 254.

As stated in the Opinion of the Court:

"Subsequent to the entry of our original judgment several of the respondents appeared and presented additional mitigating or extenuating circumstances and as a result thereof we have amended our order, as shown by the record herein, completely exonerating twenty-six of the respondents and altering and modifying the sentence of others." Petition 37a.

Attorney Donevan was given his 20 day sentence for filing the contemptuous complaint to enjoin the individual members of the Court of Civil Appeals and the individual members of the Texas Supreme Court from carrying out their orders enforcing the *Atkinson* decision and for failure to dismiss pending litigation in the Federal Court. R. 251. He made no attempt to purge himself by dismissing that contemptuous action.

8. *The Habeas Corpus Proceedings*

Following the judgment of the Court of Civil Appeals holding the Petitioners in contempt and assessing penalties and ordering the imprisonment of Petitioner Donevan he, on two occasions, applied to be released through a writ of habeas corpus to the Supreme Court of Texas. On both occasions that Court declined to do so. On the day following such denial, Attorney Donevan applied to a Judge of the United States District Court for similar relief, which was likewise denied. Thereafter Petitioner Donevan applied for a writ of habeas corpus to the United States Circuit Court of Appeals for the Fifth Circuit for similar relief and that Court on May 30, 1963, entered the following order:

"Pursuant to the provisions of Title 28 U.S.C.A., Section 2241 (b), each of the Judges composing this Court declines to entertain an application for writ of habeas corpus, and the said writ is hereby, DENIED."

Summary of Argument

At page 43 of their Brief, Petitioners state that what they ultimately seek herein is a Federal Court retrial on the "merits" of their claim to prevent construction of an airport runway and issuance of bonds to pay therefor. This Petition does not raise a substantial federal question on the "merits" of the relief sought by Petitioners, because the Texas courts decided these "merits" in 1961-62 in the *Atkinson* case and this Court denied certiorari to review that judgment. The filing of the *Brown* case in Federal Court and the adding of new parties and new grounds seeking the relief previously adjudicated by the state court judgment in *Atkinson* does not enable Petitioners to escape the bar of *res judicata*, as all of these grounds for the same relief could have, and should have, been raised in the state court for adjudication. The fact that the state court adjudication was a class action adds strength to the *res judicata* bar.

The same relief sought in state court is sought in Federal Court, i.e., prevention of the construction of the parallel airport runway. The Petitioners' claim to an absolute right to a Federal Court decision on the merits of their complaint to relitigate the merits of the state court judgment is unfounded. There is no such right where as here there is no exclusive jurisdiction in the Federal Court to decide these merits. A state court having jurisdiction over the parties can decide Federal constitutional and statutory questions raised by Petitioners and its decision is just as much *res judicata* in other courts as is any decision the Federal Court might render. Moreover as pointed out

above, a Federal Court had decided that Petitioners' claims were without merit, *supra* page 13; footnote 3.

II

The relief sought by Petitioners herein of relitigation of "merits" adjudicated previously being thus barred by *res judicata*; this case resolves into whether Texas state courts may protect their judgment on the merits herein by the issuance of an order prohibiting such relitigation by Petitioners of those merits in a Federal Court, whether contempt judgments are proper for violation of such a prohibitory order, and whether the penalties involved are reasonably within the court's discretion. That acts of contempt were committed by Petitioners is apparently admitted. Petitioners not only continued prosecution of their prohibited relitigation case in Federal Court but in an act obviously designed to show their utmost contempt for the Texas courts and their judges they filed a separate new complaint in Federal Court against the very judges of the Texas Courts responsible for the relitigation prohibition.

That Texas Courts may enter such a protective order when it is "necessary" to enforce their judgments is well established by the decisions of this Court. *Princess Lida v. Thompson*, 305 U.S. 456, 466; *Kline v. Burke Construction Co.*, 260 U.S. 226, 231. And a case of greater "necessity" is hard to imagine because in this case a plea of *res judicata* is not an adequate remedy because the mere filing of the unmeritorious relitigation complaint has the instant effect of destroying the efficacy of the Texas court's judgment allowing construction of the runway and sale of the bonds. (R. 280, 283).

III

The decision of the Texas Supreme Court interpreting the Texas Constitution and statutes as conferring juris-

dition upon it to mandamus the Texas Court of Civil Appeals to issue the Writ of Prohibition involved herein is not reviewable by this Court. *Kersh Lake Drainage District v. Johnson*, 309 U.S. 485, 489; *Fisher v. Pace*, 336 U.S. 155, 162.

IV

The contempt proceedings were conducted in full compliance with every requirement of due process of law as to notice, fair hearing and full consideration of the rights of all Petitioners. Petitioners were notified of the acts prohibited not only by service of the court's order in person upon their counsel, but they received notice also by mail, had meetings with their counsel to discuss the order and had the order called to their attention by the Federal Court. Petitioners thus had an extraordinary amount of notice of the order and its import prior to their violations of it. And pursuant to still another notice each Petitioner appeared at the contempt proceedings before the Court and answered to his or her name when it was called prior to the hearing on whether they had committed acts of contempt of that order. All were given an opportunity to testify and to present their defenses through counsel but each Petitioner acting pursuant to the advice of his counsel declined to testify. (R. 221-222). The Court fully explained the nature of the proceedings to each Petitioner. The Court allowed all of the Petitioners an opportunity to absolve or purge themselves of the charges and twenty-six of the Parties did so absolve or purge themselves thereby avoiding contempt penalties. That the intentional and admitted defiance of the valid court orders herein is contemptuous conduct is beyond question.

After affording Petitioners in person or through their counsel a full opportunity to present all evidence or defenses which they desired to present a conclusion and judg-

ment of contempt was properly made by the Court. The penalties imposed were most reasonable under the circumstances and certainly no more than necessary to protect the Court's jurisdiction to enforce its judgment and prevent Petitioners from in effect taking the law into their own hands in open defiance of the Court's order. Especially is this true as to the penalties where the Court went to such length to allow Petitioners to absolve or purge themselves of the contempt adjudication. The Court carefully and reasonably exercised its discretion by imposing only those punishments these open and flagrant contempts required.

V

Aside from all other considerations, it is universally established that the order of the Texas Civil Court of Appeals must be obeyed by Petitioners unless and until it is stayed or reversed. Where as here the Court had jurisdiction, this is true under the decisions of this Court even when such an order is erroneously entered. *Howat v. Kansas*, 258 U.S. 181, 189-191; *United States v. United Mine Workers*, 330 U.S. 258, 293. The interests of orderly government and administration of justice demand that such a rule prevail because respect for and compliance with orders issued by the courts is essential to survival of the rule of law. In no other way can the integrity, dignity and effective functioning of our independent judiciary, and the rule of law in our nation, be maintained.

VI

ARGUMENT**1. No Substantial Federal Question is Presented on the
Merits****a. *Res Judicata Bars Relitigation in Federal Court of the
Merits Previously Decided by Texas Courts***

Petitioners are attempting to relitigate in a Federal Court the "merits" of a claim which has been decided adversely to them in prior state court actions and which this Court refused to review in 1962. *Atkinson v. City of Dallas*, 353 S.W. 2d 275 (Tex. Civ. App. 1962), cert. den., 370 U.S. 939, rehearing den., 371 U.S. 854. This is made crystal clear in Petitioners' Brief, page 43, wherein they ask that this Court order the Federal District Court "to proceed to trial of the case [i.e., *Brown v. City of Dallas*, see page 2 *supra*] on its merits." This prayer for relief reveals precisely that Petitioners seek, in ultimate thrust, to relitigate the merits of their claim on issues either actually decided by the courts in *Atkinson* or issues which could have been decided in *Atkinson*. The fact that parts of Petitioners' complaint raises questions under the Federal Constitution and statutes is of no moment as state courts have just as much power to decide Federal questions properly raised before them as do Federal courts. None of the questions raised by Petitioners in the *Brown* case are questions confined to the exclusive consideration or jurisdiction of a Federal court. And Petitioners have no constitutional or statutory right, as they seem to contend (Pet. Brief p. 24-26), to a Federal court decision upon them. When a court with jurisdiction decides the merits of a controversy

the *res judicata* rule applies whether the decision is made by a Federal or a state court.

This Court has held on numerous occasions that a judgment is *res judicata*, as between parties and their privies, not only as to matters in issue but also as to matters which might have been put to issue. *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 282-283; *Heiser v. Woodruff*, 327 U.S. 726, 735; *Cromwell v. Sac County*, 94 U.S. 351, 352; *Grubb v. Public Utilities Commission*, 281 U.S. 470, 475; *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 378. In *Fishgold*, Mr. Justice Douglas stated for this Court on page 282:

"This elementary principle has long been recognized. Black, *The Law of Judgments*, 2d ed. pp. 761, 821, 936. As stated in *Cromwell v. Sac County*, 94 U.S. 351, 352 . . . a prior judgment is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

The issues raised by Petitioners in their Federal Court suit (*Brown*) are issues actually raised and decided against them in their First suit (*Atkinson*) or are issues which should or could have been raised in *Atkinson* and are thus *res judicata*.

The Supreme Court of Texas carefully analyzed the *Atkinson* and *Brown* complaints to determine whether the plaintiffs in *Brown* were bound by the judgment in the *Atkinson* case and were seeking to relitigate issues fore-

closed by that judgment. That Court determined after a comprehensive analysis and examination of the pleadings in the two cases that they are one and the same suit seeking the same relief, i.e., prevention of the construction of the airport runway. R. 283-286.

In addition, the United States District Court in dismissing *Brown* indicated that the parties, merits and relief sought in *Brown* are similar to the *Atkinson* case and no justiciable issue was presented to it in *Brown*. R. 306, 307.

Petitioners' statement that they sought in the *Atkinson* case to enjoin the issuance of "proposed" bonds and that the pleadings clearly demonstrate that "outstanding" bonds were not under attack nor could they have been because of the lack of holders of outstanding bonds as parties defendant is merely sophistry.⁴ All of the facts with reference to the outstanding bonds were a matter of record at the time of the institution of the *Atkinson* case and Petitioners could have litigated the matter in that case.

It is clear that under the facts herein and the law as set forth in this Court's decisions, Petitioners are in error in contending that *Brown* is not barred by *res judicata* due to the *Atkinson* decision. All their changes in *Brown* to cite new grounds and new parties are of no avail to escape that plea as all their new grounds and their new parties were available when *Atkinson* was filed and decided. Petitioners cannot deny that the same result is sought in *Brown* as in *Atkinson*, i.e. prevention of the runway by stopping the sale of bonds to finance it.

⁴ Contrary to the contention of Petitioners, Article 1269-j of Vernon's Annotated Texas Civil Statutes authorizes the sale of revenue bonds payable strictly out of Airport Revenues. Neither said law nor any other law requires the vote of the people prior to their issuance, so there is no civil right to be enforced. R. 268. The *Atkinson* case settled the validity of the issuance of the revenue bonds. R. 284.

b. *Res Judicata Applies to the Class Action Judgment*

Petitioners vainly attempt to escape the conclusion that *Atkinson* is *res judicata* as to the issues presented in *Brown* by contending that new parties and new causes of actions are presented for setting aside the bonds and preventing the construction of the runway. (See, e.g., Pet. pp. 6-11 where this attempt on the part of Petitioners takes the form of their recitation of various and sundry "federal causes of action"). However, Petitioners' contentions in this respect ignore the fact that all such "federal causes of action" were in existence when *Atkinson* was filed and they also misconceive the purpose and effect of *Atkinson* as a class action.

The fundamental principles of *res judicata* are applicable in appropriate class actions, such as the *Atkinson* case. *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302; *Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662, 672; *Supreme Council, Royal Arcanum v. Green*, 237 U.S. 531, 546. In *Smith*, this Court stated on pages 301-302.

"For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."

In *Hartford Life Insurance Co. v. Ibs*, *supra*, at page 673, quoting from *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48, this Court stated:

"—even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified."

Similarly, it was held in *Forsyth v. Hammond*, 166 U.S. 507, 518 that "though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions."

Moreover, this Court has held that the applicability of the *res judicata* principle is a matter of state law. *Kersh Lake Drainage District v. Johnson*, 309 U.S. 485, 489. And under applicable Texas law the issues involved in *Atkinson* and the issues raised, or which could have been raised therein, are deemed *res judicata*. *Cochran County v. Boyd*, 265 S.W. 2d 364 (Tex. Civ. App. 1930); *Snelson v. Drane*, 134 S.W. 2d 445 (Tex. Civ. App. 1939). In *Cochran County*, the Court made a statement at pp. 365-366 which is most appropriately quoted here:

"The general rule is that, in the absence of fraud or collusion, a judgment for or against a county or other municipality is binding and conclusive upon all residents, citizens, and taxpayers, in respect to the matters adjudicated which are of general and public interest, and that all other citizens and taxpayers similarly situated are virtually represented in the litigation and bound by the judgment, and this applies especially to

judgments relating to the validity of county bonds. 34 C.J. 1028 §1459.

"The reason for this rule is stated by the same authority on page 1029 as follows: 'If this were not so, each citizen, and perhaps each citizen of each generation of citizens, would be at liberty to commence an action and to litigate the question for himself. * * * If a judgment against the county in its corporate capacity, does not bind the taxpayers composing the county, then it would be difficult to imagine what efficacy could be given to such judgment.' See also, 15 R.C.L. 1035 §510.

"The Supreme Court has adhered to this rule in the case of *Hovey v. Shepherd*, 105 Tex. 237, 147 S.W. 224, 225 in which it is said: 'The interveners were not parties to the suit of the K.C., M. & O. R. Co. v. *City of Sweetwater*, [62 Tex Civ. App. 242, 131 S.W. 251; Id., 104 Tex. 329, 137 S.W. 1117] at the time the judgment of this court was entered but they were citizens of that municipal corporation, and the important question in the case is reached by the announcement of the well-settled proposition of law that, if the matter adjudicated affected the interest of the public as distinguished from the private interest of the citizens of the city, although not parties to the suit, all citizens are concluded thereby.'"

The Texas Rules of Civil Procedure, Rule 42, authorizes class actions, and under Texas law all members of the class are bound by an adjudication if the class were adequately represented. R. 285. No contention is made here that the class involved in the instant cause was not adequately represented.

In holding that the parties in the *Brown* case in the

Federal Court were bound by the decision in *Atkinson*, the Texas Supreme Court stated:

"It is immaterial that *Brown* is not a class action. The controlling fact is that *Atkinson* was a class action as authorized . . . ; and being a class action of the hybrid type, the judgment in *Atkinson* binds all members of the class insofar as validity of the bonds and the right of the city to construct runways are concerned if the class was adequately represented by those who sued on behalf of the class. The description of the plaintiffs in *Brown* shows clearly that they are members of the class represented by the plaintiffs in *Atkinson*, and it is not suggested that they were not adequately represented in that suit. Their right to relitigate the same issues is foreclosed. . . . This must be so. If it were not so, different groups of Dallas citizens could halt all efforts of the City to improve its airport facilities by filing new suits. Such an absurdity cannot be tolerated." R. 285.

The upshot of this already protracted litigation is that Petitioners want more than their "day in court." From the filing of the original complaint in *Atkinson* in 1961 where Petitioners lost on the merits to the present time, Petitioners have been seeking the same relief in their many court appearances, i.e., to prevent the construction of the parallel runway.

Clearly, the applicability of the *res judicata* and collateral estoppel rules demonstrate that no substantial federal question on the merits is presented by Petitioners, and that the actions of the Texas courts should be affirmed. And in spite of the fact that two of Petitioners' prayers (Brief 42-43) are directed at the Federal District Court that Court's actions are obviously correct and are not here under review.

2. The Texas State Court Had Jurisdiction to Issue Order to Enforce its Judgment by Prohibiting Vexatious Relitigation of Merits in Federal Court for Harassment Purposes

A state court may enjoin parties from prosecuting proceedings in a federal court in order to preserve its control over the subject matter of a suit properly within its jurisdiction. *Princess Lida v. Thompson*, 305 U.S. 456, 466. After applying the converse of this rule, this Court in *Kline v. Burke Construction*, 260 U.S. 226, 235, said:

“The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law, based upon necessity; and where the necessity, actual or potential, does not exist, the rule does not apply.”

It would be difficult to imagine a case of greater “necessity” for restraining parties from prosecuting relitigation proceedings than exists in the case at bar. Here no question of mere personal liability or even of an ordinary injunction is involved. Here the mere filing of a complaint by the Petitioners in any court, with whatever motive, has the automatic legal effect of preventing the sale of the city bonds to build the parallel runway which Petitioners oppose. R. 280, 283. Surely after emerging victorious from two years of bitter litigation Respondents have gotten something more than a plea of *res judicata* to be used in another full course of litigation in Federal Courts during which time an essential public project continued to be blocked.

Under such a situation, Petitioners after losing on the merits, could in time become the real victors. Respondents

submit such an incongruous result is not compelled by any law rule applicable in this case.

This Court has often held to the contrary. In *Phoenix Life Insurance Co. v. Bailey*, 80 U.S. 616, 618, the Court said "Authorities to show that equity will interfere to restrain irreparable mischief, or to suppress oppressive and interminable litigation, or to prevent multiplicity of suits, is unnecessary, as the proposition is universally admitted."

In *Cole v. Cunningham*, 133 U.S. 107, insolvency proceedings were in progress in the Supreme Judicial Court of Massachusetts against a debtor who had assets in New York, and certain Massachusetts creditors were prosecuting attachment suits in New York in an attempt to evade the laws of their domicil and obtain a preference over other creditors. This Court affirmed the decree of the Massachusetts Court restraining the creditors from prosecuting these suits.

In *Bradford Electric Light Co. v. Clapper*, 286 U.S. 144, at 159, this Court, in holding the provisions of a Vermont Workman's Compensation law applicable on the facts to a suit in Federal District Court in New Hampshire, said "By requiring that, under the circumstances here presented, full-faith and credit be given to the public acts of Vermont, the Federal Constitution prevents the employee or his representative from asserting in New Hampshire rights which would be denied him in the State of his residence and employment. A Vermont court could have enjoined Leon Clapper [the plaintiff's intestate] from suing the Company in New Hampshire, to recover damages for an injury suffered there, just as it would have denied him the right to recover such damages in Vermont." (Emphasis supplied.)

In *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44, cited by Petitioner, this Court held that a state court could not

enjoin a resident of the state from prosecuting a cause of action arising under the Federal Employers' Liability Act in a Federal court situated in another state because the Act specifically provided for venue there. This Court based its decision on the venue section of the Act, saying that the privileges granted therein could not be abrogated by the state court. However, citing *Cole v. Cunningham, supra*, this Court did point out that the power of the state court to prevent a resident under its jurisdiction from doing inequity does exist. Moreover, this Court expressly recognized the proposition that a state court can enjoin litigation in another court where this subsequent litigation is purely vexatious and harassing. *Id.* at p. 52. In a dissent Mr. Justice Frankfurter observed that the majority opinion did not give new currency to the "discredited notion that there is a general lack of power in the state courts to enjoin proceedings in Federal Courts." *Id.* at p. 56. That power was later recognized by this Court in a similar situation in *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 383. Further, in the case of *Blanchard v. Commonwealth Oil Co.*, 294 Fed. 2d 834, (5th Cir. 1961) the Court held that where a party brings suit in a Federal Court, in contempt of an outstanding injunction issued by a state court the Federal court should dismiss the complaint without reaching the plea of *res judicata* or any other issue going to the merits of the claim.

The power of a court to enforce its judgment was also recognized in *Root v. Woolworth*, 150 U.S. 401, where a prior adjudication of title to land was enforced by injunction after a period of twenty years.

In *Steelman v. All Continent Corporation*, 301 U.S. 278, 291, a bankruptcy court had ordered a defendant to produce his books and records in an attempt to discover his assets. Subsequently, a suit was filed in another Federal court against the trustee in bankruptcy by a corporation to re-

move a cloud from certain property of the corporation alleged to be owned by the defendant. The bankruptcy court enjoined the corporation from proceeding in the Federal Court upon evidence that its pending suit was part of a scheme to defraud creditors of the defendant. This Court, in upholding the injunction, said (as did the Texas Supreme Court herein, R. 277, 286) that the restraint of a suitor to a proceeding is not a restraint of the court itself.

In their brief Petitioners rely heavily on *Central National Bank v. Stevens*, 169 U.S. 432. But there this Court said at page 464: ". . . [I]t has been frequently determined by this court that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until the judgment shall be satisfied. . . . [I]t is scarcely necessary to quote authorities to show that to deprive a court of the power to execute its decrees is to essentially impair its jurisdiction. . . ." Surely the court which rendered judgment in the *Atkinson* case had power to do all that is necessary to execute its judgment over the opposition of Petitioners. Thus the *Central National Bank* case does not support the position of Petitioners. There after a Federal court had already issued a final judgment establishing the title and rights of the holders of certain certificates a suit was brought in a state court attempting to again establish title and rights to the same certificates and restrain the parties from enforcing the decree of the Federal Court. Clearly the state court could not do this. That case is not like the case at bar because the court in *Atkinson* had already entered a final decree before Petitioners attempted to relitigate their claim in the Federal Court, thus placing the state court here in a situation somewhat analogous to that of the Federal court there. This Court should uphold the state court here as it did the Federal Court there and for identical reasons.

Petitioners cite *United States v. Johnson County* 6, Wall.

166, for the proposition that state courts have no power to restrain either the process of, or proceedings in, Federal Courts. However, all that was actually held in that case was that the fact that a state court had enjoined county officers from levying a tax to satisfy a judgment rendered by a Federal court was not a defense to an application to a Federal court for a writ of mandamus to require such officers to levy a tax for that purpose. Since the application for mandamus was a proceeding ancillary to its judgment in a proceeding where the Court had jurisdiction, and was a substitute for the ordinary process of execution to enforce payment of the judgment the Federal court had power to issue it. To the same effect, under similar circumstances, is *United States v. Lee County*, 6 Wall. 210, also cited by Petitioners, in which this Court pointed out that the mandamus proceeding was the exercise of jurisdiction which had previously attached. And *Johnson County*, *supra*, was followed, under similar circumstances, in *United States ex rel. Moses v. Keokuk*, 6 Wall. 514, another case Petitioners cite which does not support their position. Petitioners categorize *Blanchard v. Commonwealth Oil Co.*, *supra*, as a case involving a state court injunction to protect its jurisdiction in an *in rem* action. (Pet. Br. 21, 22.) That case was not an action *in rem* but *in personam*. Furthermore, the *Blanchard* case held that since the Florida Supreme Court issued an injunction against Blanchard from litigating the case in the Federal Court in Texas therefore it was the duty of the Federal District Court in Houston to honor the injunction and dismiss the case.

Petitioners in their suits in the Federal District Court were attempting to relitigate the merits adjudicated by the state courts and by this Court. Under such circumstances the above decisions of this Court established that the Texas courts have the power to enforce their judgment by injunc-

tion to prevent the relitigation in Federal court of the merits previously adjudicated by them.

3. The Texas Supreme Court Had Jurisdiction to Mandamus the Court of Civil Appeals

Pursuant to the Constitution and statutes of Texas and judicial interpretation thereof, the Supreme Court of Texas had jurisdiction, power and authority to mandamus the Judges of the Court of Civil Appeals to vacate a denial of the City's petition for a Writ of Prohibition and direct that Court to issue whatever writs were necessary to enforce its Judgment in the *Atkinson* case. Petitioner's contentions to the contrary are without merit.

Article 5, Section 3 of the Texas Constitution provides that "The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State." Pursuant thereto Article 1733 of Vernon's Annotated Texas Civil Statutes confers jurisdiction upon the Texas Supreme Court to issue writs of mandamus agreeable to the principles of law regulating such writs against any district judge, or Court of Civil Appeals or judges thereof.

This question of its power to mandamus the Court of Civil Appeals was considered and ruled on by the Texas Supreme Court in its Opinion in *City of Dallas v. Dixon*, of which Petitioners seek reversal, R. 278 et seq. The Texas Supreme Court's ruling that it possessed such power is based upon extensive judicial precedent from the Texas Courts. *Gulf C. & S. F. Ry. Co. v. Muse*, 109 Tex. 352, 207 S. W. 897 (1919); *Cleveland v. Ward*, 116 Tex. 1, 285 S. W. 1063 (1926); *Simpson v. McDonald*, 142 Tex. 444, 179, S. W. 2d 239 (1944).

The Texas Supreme Court's decision interpreting the

Texas Constitution and Texas statutes as conferring jurisdiction upon it to mandamus the Court of Civil Appeals to issue the Writ of Prohibition involved herein is binding upon this Court and will not be reviewed or reversed. *Kersh Lake Drainage District v. Johnson*, 309 U.S. 485, 489; *Fisher v. Pace*, 336 U.S. 155, 162; *Erie Railroad Company v. Tompkins*; 304 U.S. 64, 78, 79; *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500.

4. The Contempt Proceedings Herein Afforded Petitioners all Requirements of Due Process of Law

Traditionally, courts have claimed and exercised the power to convict and sentence those found guilty of contempt of court orders. Important public policy considerations have justified the exercise of this contempt power by the judiciary. Without question, if courts are to be more than mere sounding boards for the opposing viewpoints, they must have power to enforce obedience to judicial decrees and orders.

The defendant in a contempt proceeding must be accorded due process of law. *Cooke v. United States*, 267 U.S. 517, 536; *Ex parte Terry*, 128 U.S. 289, 309. And the Petitioners in the instant case were accorded the full measure of due process. Petitioners were given reasonable notice and an opportunity to be heard. A full judicial trial was conducted in which Petitioners were represented by counsel. The Record before this Court is replete with evidence that Petitioners were guilty of violating the injunctive order; and in fact, such guilt is substantially admitted by Petitioners. Moreover, the punishment imposed by the Texas Court of Civil Appeals in these contempt proceedings was entirely fair, reasonable, and proper when considered in the light of the offense committed. Further, each Petitioner was given

an opportunity to purge himself by discontinuing the acts of contempt.

Each of the due process protections afforded Petitioners is discussed below:

a. Reasonable Notice and An Opportunity to be Heard Were Given to Petitioners.

Petitioners were given notice of the hearing on their violations of the Writ of Prohibition and Ancillary Orders issued by the Texas Court of Appeals and the order to show cause recited these violations. R. 82-90. Petitioners all appeared in person and by counsel in response to the notice and a full judicial trial was conducted in which Petitioners' rights were fully protected. R. 117-247. On pp. 221-22 of the Transcript, the following colloquy occurred during the contempt proceedings below:

"The Chief Justice: I take it then, and the record will show that everyone here was given an opportunity to testify. And they were also notified that they didn't have to testify; not required to.

"Mr. Kueera: Your Honor, may the record also show that the City of Dallas was ready and present in Court, and everyone of these parties that was cited for contempt to testify, upon advice of counsel they have refused to do so. And also was given an opportunity individually to select whether they wanted to follow the advice of counsel, and they declined to take the stand.

"The Chief Justice: I think the record so shows. Is that true, Mr. Donovan?

"Mr. Donovan: Yes, Your Honor, except the one thing that I said, that as of this moment that is my

advice. I reserve the right as the proceeding goes forward to change that advice if it becomes proper.

"The Chief Justice: Very well.

"Mr. Donovan: But as of now, that is my recommendation, and the record may show that."

On May 10, 1963, Petitioner Donovan filed a Motion for Continuance (R. 93-95) in which he stated, under oath, that he had been served with an Order to Show Cause, directing him to appear before the Court to show cause why he should not be punished for contempt. R. 93-94. And on pages 136-137 of the Record there are references to the fact that Petitioner Donovan personally was handed a copy of the Texas Court of Civil Appeals' Writ of Prohibition and Ancillary Orders and that the other Petitioners in this case were served and given notice either by mail or through their counsel, Petitioner Donovan. The Record further reveals that the Clerk of the Texas Court of Civil Appeals testified that he placed in the United States mail envelopes addressed to the parties in the contempt proceedings and that these envelopes had a return address and that none of them was returned to him. R. 214. The fact is that the Record before this Court abounds with evidence that the Petitioners had ample notice of the injunctive order outstanding and the contempt proceedings.⁵

⁵ Cf. R. 123, wherein the Chief Justice of the Court of Civil Appeals states that "... we issued notice to the parties to appear and show cause why they should not be held in contempt of the court. . ." R. 303, wherein Petitioner Donovan stated in the United States District Court Proceedings that an injunction had been served on them which enjoined everybody in the Love Field area and the attorneys representing them from attempting to prevent the construction of a new runway or questioning the validity of the bonds. R. 337, involving proceedings in the United States District Court for the Northern District of Texas, wherein Petitioner Donovan stated that he had advised his clients that a Writ of Prohibition and Ancillary Orders was outstanding and that by coming into the District

Furthermore, the transcript of the contempt proceedings of May 20, 1963, clearly reveals that the Chief Justice provided each party charged with an opportunity to purge himself of the possibility of contempt. The Chief Justice advised each party that:

"All we are here about this morning is to determine whether any or all of you should be held in contempt of court for refusing to obey a court order to desist from proceeding with the litigation in Federal Court. That's all we are here about." R. 124

Then, the Chief Justice called each person by name and personally asked each of them if he were present; and if he were appearing at the hearing as one of the parties charged; and, if he were entering his appearance, whether he was represented by counsel. R. 123-136. If a party at this time indicated that he was not so appearing, the Chief Justice gave him an opportunity to withdraw from the case. Also, if the party was shown not to have been served; or if he

D Court to further prosecute the matter they may be subjecting themselves to fine and imprisonment and those appearing in the District Court did so under written signature acknowledging that statement. R. 93, wherein Petitioner Donovan acknowledged the fact that he and his clients were served with the Order to Show Cause for disobedience of the Writ of Prohibition. R. 139, wherein Petitioner Donovan states that he had advised his clients that they were not in contempt if they did not obey the Writ of Prohibition of the Court. R. 214, Testimony of the Clerk of the Texas Court of Civil Appeals that he had mailed copies of the Writ of Prohibition And Ancillary Orders to the litigants. R. 226, Petitioner Donovan stated, under oath, that after the issuance of the Writ, he advised his clients and that such Writ is invalid. R. 228, Petitioner Donovan stated under oath that he held meetings with his clients and gave written notice to them, after receiving a copy of the Writ. R. 93, Motion for Continuance with Petitioner Donovan's affidavit, wherein Petitioner Donovan admits that: (1) he is the attorney of record for all of the Respondents in the contempt proceedings; and (2) he has been served with notice on May 8, 1963 to show cause why he should not be punished for contempt of court, directing him to appear before the Court at 9 a.m. on Monday, May 13, 1963, to show cause why he should not be punished for contempt of this Court.

had filed a motion to dismiss himself from the case; or indicated that he did not know that he had been a party to the proceedings; or if he indicated that he was not appearing as a party charged, such party was dropped from the list of those later charged with contempt of court. R. 120-136.

It is crystal clear that the foregoing convincingly establishes that Petitioners had more than adequate notice of the Court's injunctive order and the consequences which would result from a violation thereof. They were given notice of the contempt proceedings and afforded a real opportunity to purge themselves, and some of the parties to these contempt proceedings did just that. Altogether 26 of the Respondents purged themselves of contempt and the sentence of others was modified. Petition p. 37a.

Contempt proceedings are not required to assume any particular form so long as the substantial rights of the accused are preserved. *Cooke v. United States*, 267 U.S. 536, 537; *In re Salvin*, 131 U.S. 267, 278, 279; *Ex parte Terry*, 128 U.S. 289, 309. What was stated above manifestly demonstrates that the substantial rights of Petitioners were fully preserved. Petitioners not only received actual notice of the outstanding injunctive order and the contempt proceedings but they also received notice through their counsel, Petitioner Donovan. And as counsel for Petitioners, Petitioner Donovan was charged with the responsibility of communicating the existence of the injunction to those whom he represented; and, as stated previously, he concedes that he did so communicate this knowledge. Notice to a party's agent or attorney is notice to the party. *Camarota v. United States*, 111 F. 2d 243 (3rd Cir. 1940), cert. denied, 311 U.S. 651; *Texas Quarriers, Inc. v. Pierce*, 244 S.W. 2d 571 (Tex. Civ. App. 1951); *Romero v. Grande Lands*, 288 S.W. 2d 907 (Tex. Civ. App. 1956); Cf. *Russell v. United States*, 86 F. 2d 389 (8th Cir. 1947); *United States v.*

Brotherhood of Railroad Trainmen, 95 F. Supp. 1010 (D.C. Dist. of Col. 1951). In *Camarota*, the defendant had the opportunity to consult with counsel; was informed that a presentment for contempt would be lodged against him; a copy of the presentment was mailed to his counsel; and, though the defendant was not served with a formal rule to show cause, he was told personally to appear before the judge and answer the charge, and he did in fact appear with counsel at the stated time and place and offered evidence in his defense. The Court held that he had been accorded full due process of law.

Notwithstanding the fact that Petitioners had personal notice of the issuance of the injunction and contempt proceedings by having been served by mail, it is the law in Texas that knowledge of the issuance of an injunction, even without formal personal service, is a sufficient basis for a contempt conviction for violation of the outstanding injunction. *Ex parte Young*, 103 Tex. 470, 129 S.W. 599 (1910); *Ex parte Stone*, 72 S.W. 1000 (Tex. Crim. App. 1903); *Ex parte Testard*, 102 Tex. 287, 115 S.W. 1155 (1909). In *Ex. parte Haubelt*, 57 Tex. Cr. R. 512; 123 S. W. 607 (1909) The Texas Supreme Court said:

*** * * He comes into court and announces ready for trial, and the mere fact that he did not have a formal summons is thereby waived, since the only purpose of this summons would be to apprise him of the fact that he was to be tried for contempt. When he waives that citation, and comes into court, and announces ready, admitting that he openly defied the order of the court, no legitimate purpose could have been subserved, and no interest of his preserved, by a bare citation. * * *

b. A Full and Fair Judicial Trial Was Accorded Petitioners

The Record in this cause clearly reveals that Petitioners were accorded a full and fair judicial trial in which their constitutional rights were fully protected. Petitioners filed a Motion to Quash and Answer to the contempt charges, and this Motion was heard with Petitioner Donovan appearing for Petitioners (Respondents below). R. 117, et seq. The Court reviewed the history of the litigation and emphasized what was involved. R. 122, 123. And, as stated above, the Court then called the name of each Respondent below to determine if he were present and represented by counsel and whether he knew the nature of the proceedings and wished to continue as a party. Petitioner Donovan presented a Reply Argument on Behalf of the Respondents below. R. 139-159. The Motion to Quash was denied. R. 162. A list of the names to whom the Writ of Prohibition and Ancillary Orders had been sent was admitted into evidence R. 171, 241-247; testimony was taken and direct and cross examination conducted, R. 187-235; and full time and opportunity was given to every party who wished to be heard.

On May 22, 1963, the Texas Court of Civil Appeals stated that:

"We have come to this conclusion that there has been a defiance of law, and that it is our duty to take notice of it and to take appropriate steps in view of it." R. 235.

The Court then imposed the fines of \$200 each and sentenced Petitioner Donovan to 20 days in the County Jail of Dallas County (R. 237-238), pursuant to its Judgment of Contempt. R. 248-254. Clearly, the judicial trial accorded Petitioners in these contempt proceedings gave them their full measure of due process of law. *Cooke v. United States*,

267 U.S. 517, 536; *In re Salvin*, 131 U.S. 267, 279; *Ex parte Terry*, 128 U.S. 289, 309; *United States v. United Mine Workers of America*, 330 U.S. 258, 298; *Eilenbecker v. District Court*, 134 U.S. 31, 38; *Camarota v. United States*, 111 F. 2d 243 (3rd Cir. 1940), cert. denied, 311 U.S. 651.

c. The Evidence Supports the Contempt Convictions

The evidence supporting the contempt convictions is clear and convincing. The fact is that there is no issue as to whether the injunctive order of the Texas Court of Civil Appeals was violated, for Petitioner Donovan specifically concedes this point. R. 212, 332, 337. And, as stated by the Court of Civil Appeals:

"... each of them, have been guilty of contempt of this Court by violating the Writ of Prohibition and injunction heretofore issued by us in the following respects:

- (a) In failing to request the Federal Court to dismiss the case of Daniel C. Brown, et al. v. City of Dallas, et al., No. 9276 pending in the United States District Court.
- (b) By filing motion contesting the dismissal of said Brown suit in the Federal Court;
- (c) That the respondents who made themselves new parties in the Federal Court case, following the issuance of our Writ of Prohibition and injunction, were guilty of contempt in knowingly aiding and abetting the further prosecution of said suit in the Federal Court;
- (d) In appearing and vigorously and actively opposing and contesting the motion to dismiss the Brown suit in the Federal Court;
- (e) By taking exceptions to the order of the Federal Court in dismissing the Brown suit;

(f) By filing cause No. CA-3-63-126 Civil styled James P. Donovan, et al. v. Supreme Court of Texas, et al., in the United States District Court which said suit seeks to interfere with the enforcement of the Writ of Prohibition issued by this Court" Pet. 34a.

The fact is that Petitioners are not contesting the proposition that they actually violated the Texas Court of Civil Appeals' injunctive order. R. 212, 332, 337. Rather, Petitioners argue that the Court lacked the authority to issue the order, and that the Texas Supreme Court is without power to order the Texas Court of Civil Appeals to issue the injunctive order. Respondents have fully demonstrated that such authority does exist and that Petitioners' remedy after the issuance of the injunction was an appeal to this Court. *United States v. United Mine Workers of America*, 330 U.S. 258, 293; *Fisher v. Pace*, 336 U.S. 155, 162, *infra* at pp 48-52.

d. *The Contempt Judgments Are Fully Supported by the Record*

The punishment imposed for the contempt was in no wise arbitrary or excessive, but was entirely consistent with the evidence adduced at the hearing. This Court has held that in imposing a fine for criminal contempt, the trial judge may consider the following factors: (1) the extent of the willful and deliberate defiance of the Court's order; (2) the seriousness of the consequences of the contumacious behavior; (3) the necessity of effectively terminating the defendant's defiance as required by the public interest; and (4) the importance of deterring such acts in the future. *United States v. United Mine Workers of America*, 330 U.S. 258, 302-303. The Court in that case went on to state that "Because of the nature of these standards, great reliance

must be placed upon the discretion of the trial judge." This Court also stated that in assessing the proper punishment to be meted out for contempt, a court "must then consider the character and magnitude of the harm threatened by the continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." (Id. at 303.)

Justice Frankfurter in his concurring opinion in *United States v. United Mine Workers of America*, stated on page 12 that:

"In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny."

Applying the above criteria to the facts in the instant case, it is crystal clear that the punishment inflicted by the Texas Court of Civil Appeals was not excessive. Petitioner Donovan and the other Petitioners he represented flagrantly violated the Court's injunctive order by filing a subsequent vexatious action in the United States District Court for the Northern District of Texas. Petitioners further vigorously prosecuted their original case and added and dropped certain parties thereto. Because of this willful defiance of the Court's order the City of Dallas was prevented still again from taking the necessary steps required for the completion of the improvements to Love Air Field. Hence, the public interest involved was again frustrated. Petitioners had previously delayed the construction of the Air Field by instituting judicial proceedings which

eventually terminated in favor of the City of Dallas by this Court's denying Petitioners' Writ of Certiorari, *supra*, p. 7. In *Atkinson* there is no question but that Petitioners had had their full day in court on the merits. The sole purpose of filing the action in the United States District Court and thereby violating the outstanding injunctive order was for harassment and delay, since Petitioners knew that the mere filing of the subsequent action effectively and automatically halted the issuance of the revenue bonds, the proceeds of which are required to finance the air field project.

Accordingly, the \$200.00 fines imposed upon Petitioners and the twenty-day jail sentence meted out to Petitioner Donovan were required and completely appropriate in order to put an end to Petitioners' contumacious behavior. In *Brown v. Lederer*, 140 F. 2d 136, 139 (7th Cir. 1944), cert. denied 322 U.S. 734, the Court stated that:

"... punishment in a contempt proceeding, for violation of a valid injunctive order made by a court of competent jurisdiction, is not fixed or determined. . . , but rests solely in the sound discretion of the court, subject only to the Constitutional provision against cruel and unusual punishment."

In *Brown v. Lederer*, *supra*, a contempt punishment which even exceeded the severity prescribed in the applicable statute was upheld as not excessive. Cf. *Eilenbecker v. District Court*, 134 U.S. 31, where after due notice, and opportunity of defense, a fine of \$500 and costs and imprisonment for a period of three months were imposed upon the six defendants for contempt in violating the injunction of the Supreme Court of Iowa restraining each of the defendants from selling intoxicating liquors.

If courts are to maintain their integrity, dignity and effective functioning as a judicial system under the rule of

law, and if they are to function properly in carrying out their constitutional and statutory duties, the defiance of court authority, as exemplified by the misconduct in the present case, cannot be tolerated. If the rule of law in our Nation is to be maintained, courts must vigorously protect their judgments, orders, and processes. All those who would by misconduct obstruct the administration of justice must do so at their peril. The interests of orderly government demand that respect and compliance be given to court orders issued by courts possessed of jurisdiction over the subject matter and over the litigants. These fundamental principles require affirmance of the decisions of the Texas courts herein.

5. The Injunctive Order of the Texas Court of Civil Appeals Must Be Obeyed Until Stayed or Reversed

Having been served with copies of the injunctive order, Petitioners willfully elected to flagrantly disregard the order and show their contempt by filing a new complaint against the individual members of the Texas Supreme Court and the Texas Court of Civil Appeals (R. 316-322) and then they added and dropped parties and pressed the vexatious litigation already filed (*Brown* case) in the United States District Court for the Northern District of Texas, to relitigate the merits of *Atkinson*, rather than withdrawing it. R. 306, 307. Petitioner Donovan, who had appeared in *Atkinson* and *Brown* as an attorney only now, for the first time, in the case against members of the Texas Supreme Court and Civil Court of Appeals became a plaintiff along with the other Petitioners herein. This entry of an appearance as a party, as well as counsel, could only be to show his contempt for the members of those Courts and for their orders.

Petitioners concede that they violated the outstanding injunctive order, but defend their actions on the grounds that the Supreme Court of Texas lacked authority to mandamus the Texas Court of Civil Appeals to issue the injunctive order prohibiting Petitioners from relitigating the matter and that the Texas Court of Civil Appeals' injunctive order denied Petitioners a federal forum. However, even assuming, *in arguendo*, that the action of the lower Texas courts were without authority,⁶ Petitioners' remedy was an appeal to this Court to stay or reverse the orders issued by the Texas courts. Until such an appeal was taken, Petitioners were compelled to obey these orders. For it is a well established principle that where a court has valid jurisdiction over the parties and the subject matter, an injunctive order may issue, and the parties against whom the injunction is directed are bound by such order until the order is stayed or reversed. *United States v. United Mine Workers of America*, 330 U.S. 258, 293; *Fisher v. Pace*, 336 U.S. 155, 162. In *United States v. United Mine Workers of America*, at page 293, the Court stated:


"Proceeding further, we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings."

In *Howat v. Kansas*, 258 U.S. 181, 189-190, this Court stated:

"An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings prop-

⁶ The contrary is demonstrated *supra* pp. 31-37.

erly invoking its action, and served upon persons made parties therein and within the jurisdiction must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."

Moreover, violations of an order are punishable as contempt even though the order is set aside on appeal. *United States v. United Mine Workers of America*, 330 U.S. 258, 294; *Worden v. Searls*, 121 U.S. 14, 25-27. The above proposition is also valid even though the basic action has become moot. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450. Again, in the *United Mine Workers Case*, at page 294, this Court stated:

"Orders outstanding or issued after the date [the date on which an applicable statute was declared invalid] were to be obeyed until they expired or were set aside by appropriate proceedings, appellate or otherwise. Convictions for criminal contempt intervening before that time may stand."

In stressing the importance of full compliance with judicial decrees and orders, where a court has jurisdiction over the parties and the subject matter, this Court stated in *Fisher v. Pace*, 336 U.S. 155, 162:

"If they [the court's rulings and orders] are erroneous the injured party has the plain, simple and adequate remedy of appeal. It was thus the duty of counsel to abide by its decisions even if erroneous; and if any rights of his clients were violated the remedy was by exception and appeal. Any other procedure would result in mockery of our trial courts and would destroy every concept of orderly process in the administration of justice."

The United States District Court in *Brown v. City of Dallas* (R. 306) stated, in dismissing the pending suit;

"The issues that are sought to be litigated in the case in the Federal Court have been held by the Supreme Court to be the same as the issues which have been litigated in the *Atkinson* case. The prayer for relief is similar. In my opinion there is no justiciable issue to be presented in the Federal court case. All the issues have been decided in the *Atkinson* case. I consider that you are attempting to make me an Appellate Supreme Court of the United States, and that *your appeal is to the Supreme Court of the United States, and not to this Court.*" (Emphasis supplied).

It is a manifestly clear and sound proposition that the interests of orderly government and administration of justice demand that respect and compliance be accorded to the orders issued by courts possessed of competent jurisdiction. And these orders, even if wrongfully issued, must be obeyed until proper appellate procedures are taken. In addition to the cases cited above, Mr. Chief Justice Hughes elaborates upon this principle in *Chicot-County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374-378.

Accordingly, Petitioners were validly held in contempt of court by their willful violation of the outstanding injunctive order issued by the Texas Court of Civil Appeals.

Conclusion

Petitioners, after having lost on the merits their previous class action to prevent construction of an airport runway have knowingly and flagrantly violated valid court orders issued by the Texas Court of Civil Appeals which that Court found necessary under the facts herein to protect and enforce its judgment. Rather than appeal or seek a stay of those orders prohibiting relitigation in federal court of their claim to prevent the runway, Petitioners defiantly pursued a course of flagrant disobedience and contempt by totally disregarding them. Petitioners' only defense is a claim of an absolute right to a Federal Court retrial of the merits of their claim—a defense which is totally without merit as the state Court did or could have decided all possible federal as well as state law questions and its judgment is *res judicata* thus barring the Federal Court relitigation.

After notice, full and complete court proceedings, and full opportunity to absolve or purge themselves Petitioners have been adjudged guilty of contempt. That judgment must be upheld if the dignity of, and respect for, our independent judiciary which is essential to the rule of law is to prevail. And that dignity and respect cannot be maintained if contempts, such as those committed by Petitioners, go unpunished. Petitioners were accorded all due process protections, and the contempt judgments, which are most reasonable in amount of penalty under the circumstances of this case, should be upheld.

The decisions of the Texas Courts under review herein

are within their jurisdictions and are correct in all respects and should be affirmed by this Court.

Respectfully submitted,

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APPENDIX A*Vernon's Annotated Texas Civil Statutes*

Art. 1269j-5. Airport revenue bonds; cities with population over 70,000.

Section 1. All cities having a population of more than seventy thousand (70,000) according to the last preceding federal census, may issue revenue bonds for enlarging, or extending, or repairing, or improving its airport, or for any two (2) or more such uses. Included with the meaning of improvements without limiting the generality of the term, is the construction or enlargement of hangars and related buildings for use by tenants or concessionaires of the airport, including persons, firms or corporations rendering repair or other services to air carriers. Such revenue bonds may be issued when duly authorized by an ordinance passed by the governing body of such city. Such revenue bonds shall be secured by a pledge of all, or such part of, the revenues from the operation of the city's airport as may be prescribed in such ordinance. To the extent that the revenues of the airport may have been pledged to the payment of revenue bonds which are still outstanding, the pledge securing the proposed revenue bonds shall be inferior to the previous pledge or pledges. Within the discretion of the governing body of the city and subject to limitations contained in previous pledges, if any, in addition to the pledge of revenues, a lien may be given on all or any part of the physical properties comprising such airport. Included within the authority to pledge revenues and without limiting the generality of such authority is the right to pledge all or any part of the lease considerations to be received by the city for any such hangars or buildings, and within the discretion of the governing body of the city the sole security for such bonds may be the revenues to be received from leasing any one or more of such hangars and buildings, together with or without a lien upon such hangars or buildings and the land on which they are to be situated.

Section 2. No money raised or to be raised from taxation shall be used to pay the principal of or interest on any revenue or refunding bonds issued under this Act. When any of the revenues of such airport are pledged to the payment of bonds issued under this Act, it shall be the duty of the governing body of the City in reference to the revenues pledged, to cause to be fixed, maintained and enforced charges for services to be rendered by properties and facilities whose revenues have been pledged at rates and amounts sufficient to provide for the expense of maintenance and operation of such properties and facilities and to provide the amounts of money required under such ordinance to pay principal of and interest on the revenue bonds and to provide the reserve funds required by such ordinance.

Section 3. The Revenue Bonds shall be sold at a price or prices so that the interest cost of the money received therefor, computed to maturity in accordance with standard bond interest tables, shall not exceed five per cent (5%) per annum; shall mature serially or otherwise within thirty (30) years from their date; shall be negotiable instruments under the Negotiable Instruments Act of the State of Texas; shall not be finally issued until approved by the Attorney General of Texas; and registered by the Comptroller of Public Accounts of the State of Texas, and after such approval shall be incontestable.

Section 4. Refunding Bonds bearing an interest rate or interest rates which result in the same or a lower overall interest cost to City may be either issued in exchange for or to provide funds to repurchase and retire any such revenue bonds.

Section 4(a). Bonds issued by any city having a population of one hundred fifty thousand (150,000) or more, according to the last preceding Federal Census, pursuant to the provisions of this law shall be and are hereby declared to be legal and authorized investments for banks, savings banks, trust companies, building and loan associations and all insurance companies. Such bonds shall be eligible to secure the deposit of any and all public funds of the State of Texas, and any and all public funds of cities,

counties, school districts, or other political corporations or subdivisions of the State of Texas, and such bonds shall be lawful and sufficient security for said deposits to the extent of the principal amount thereof, or their value on the market, whichever is the lesser, when accompanied by all unmatured coupons appurtenant thereto.

(729-4)